TRANSCRIPT

SUPREME COURT OF

October Term,

No.

M. L. JOHNSON, CAPTAIN,

APPELLANT,

vs.

DAVID

APPEAL FROM THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 871.

M. L. JOHNSON, CAPTAIN, UNITED STATES NAVY, APPELLANT,

vs.

DAVID B. SAYRE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

INDEX.

	Original.	Print.
Caption	1	1
Petition for writ of habeas corpus	1	1
Order granting writ of habeas corpus	4	2
Writ of habeas corpus	4	2
Marshal's return	5	3
Return to writ of habeas corpus	6	3
Supplemental petition	8	4
Proceedings had in open court	11	5
Petitioner's Exhibit A.—Proceedings of naval general court-martial.	13	6
Argument on demurrer	15	7
Decision on demurrer	27	13
Arraignment and plea	27	13
Testimony of Paymaster James E. Cann	28	13
Pay Director Casper Schenck.	49	24
Paymaster James E. Cann (recalled)	67	34
Capt. M. L. Johnson	78	40
Motion to exclude evidence, etc	90	47
Argument of Mr. Warner for defense	94	49
Mr. Happer for defense	102	53
the judge advocate	119	61
Finding and sentence	131	67
Exhibit A.—Order forming court-martial	132	68

	Original.	Print.
Proceedings had in open court—Continued.		
Petitioner's Exhibit A—Continued.		
Exhibit B.—Letter of Secretary of the Navy authorizing employment of stenographer, October 25, 1894	133	69
Exhibit C.—Charge and specification	134	69
Exhibit D.—Letter of Secretary of the Navy transmitting charge and specification, October 25, 1894	136	70
Exhibit E.—General Order No. 143	137	70
Exhibit F.—Copies of appointment, etc., of D. B. Sayre as paymaster's clerk	141	72
Exhibit G.—Single receipt	144	73
Exhibit H.—Charge and specification	145	73
Government's Exhibit B.—Letter of Acting Secretary of the Navy to Commandant Norfolk Navy-Yard, October 13, 1894	147	74
Government's Exhibit C.—Abstracts from the log of the *Franklin*, wherein reference is made to Pay Clerk D. B. Sayre	148	74
Government's Exhibit D.—Certified copies of papers from Navy Department	153	78
Finding of court	161	82
Order discharging prisoner	171	86
Petition for appeal	172	87
Assignment of errors	173	88
Order allowing appeal and fixing amount of bail bond	175	89
Citation and acceptance of service	176	89
Order to transmit record	177	89
Clerk's certificate	177	89

1 The United States of America, eastern district of Virginia, to wit:

At a circuit court of the United States for the fourth circuit, in and for the eastern district of Virginia, begun and held at the city of Norfolk on the third Wednesday of November, being the twenty-first day of the same month, in the year of our Lord one thousand eight hundred and ninety-four.

Among other were the following proceedings, to wit:

Petition of David B. Sayre for a writ of habeas corpus.—Filed November 21, 1894.

In the United States circuit court for the eastern district of Virginia.—The petition of David B. Sayre.

To the Hon. ROBT. W. HUGHES, *Judge of the said Court:*

The petition of David B. Sayre, of the city of Portsmouth, in the State of Virginia, respectfully represents—

First. That on or about the 30th day of Oct., 1894, your petitioner was ordered to appear before a naval general court-martial, convened by the Hon. Sec'y of the Navy of the U. S., at the navy yard, Norfolk, Va., to answer to a certain charge and specification of wrongdoing in the discharge of his duties as clerk to J. E. Cann, a paymaster in the Navy of the U. S.

Second. That in obedience to said order your petitioner appeared before said court-martial and pleaded not guilty to the charge and specifi-
2 cation then made and read to him; and that thereupon from day to day that trial proceeded until the 2nd day of Nov., 1894, when the said court-martial found him guilty of the said charge and specification.

Third. That on the said 2nd day of Nov., 1894, the said court passed sentence upon your petitioner, made a record of their proceedings, and transmitted the same to the said Hon. Sec'y of the U. S. Navy at Washington, D. C., after the members of the said court-martial had affixed their signatures thereto.

Fourth. That the sentence of the said court-martial was that your petitioner David B. Sayre, paymaster's clerk in the U. S. Navy, be confined in such naval prison, for the period of two years, as the Hon. Sec'y of the Navy may designate, and to lose all pay that may become due, except ten dollars per month for necessary prison expenses and one hundred and twenty-five dollars to be paid to him at the expiration of his confinement, and then be dishonorably discharged from the service of the U. S.

Fifth. And your petitioner further represents that he was not amenable to trial by court-martial, not subject to the jurisdiction of said court, and the proceedings of said court were without warrant of law and void.

Sixth. That the sentence of said court, confining your petitioner to confinement in such naval prison as the Hon. Sec'y of the Navy may designate and to the loss of pay except ten dollars per month and one hundred and twenty-five dollars at the expiration of imprisonment, is not authorized by law and is utterly null and void.

Seventh. That your petitioner now, and has been since the said findings and sentence, held and confined on the U. S. S. "Franklin," at the said Norfolk Navy-Yard, and within the jurisdiction of this honorable
3 court, under the custody of Capt. M. L. Johnson, commander of said ship, awaiting removal to such prison as the Sec'y of the Navy shall select, and thus restrained of his liberty, in violation of the Constitution and laws of the United States.

Eight. Your petitioner has made every effort in his power to procure from the Navy Department at Washington certified copies of the proceedings, finding, and sentence of said court-martial, with a view and for the purpose of vouching them with and making them a part of this his petition, but without avail.

Wherefore your petitioner prays that a writ of habeas corpus issue directed to the said M. L. Johnson, commander of said ship "Franklin," commanding him to produce your petitioner before this honorable court at the city of Norfolk, Va., at such time as the court shall direct, and he there show cause of your petitioner's detention, to the end that your petitioner may be discharged from custody.

And your petitioner will ever pray, etc. D. B. SAYRE.

VIRGINIA, *County of Norfolk, ss:*

On the 20th day of Nov., 1894, personally appeared before me, A. E. Warner, a commissioner in chancery of the circuit court of the county aforesaid, in my said county, D. B. Sayre, or David B. Sayre, whose name is subscribed to the foregoing petition, and made oath that the statements contained in the same are true to the best of his knowledge and belief.

A. E. WARNER,
Commr. in Chancery, Circuit Court Norfolk Co.

JNO. W. HAPPER,
ALEX. E. WARNER,
Counsel for Petitioner.

4 *Order on foregoing petition allowing writ of habeas corpus. Filed November* 21, 1894.

Let the writ issue as prayed for, returnable at Norfolk, Virginia, on the 26th day of November, 1894, at twelve o'clock noon.

RO. W. HUGHES, *Judge.*

Writ.

Circuit court of the United States, eastern district of Virginia, ss:

The President of the United States of America to M. L. Johnson, captain, commanding receivingship "Franklin" of the United States Navy, greeting:

We command you that the body of David B. Sayre, detained by you and under your custody, as it is said, by whatsoever name he may be called, together with the day and cause of his being taken and detained, you have before the judges of our circuit court of the United States for the eastern district of Virginia, sitting at the city of Norfolk, in said dis-

trict, on Monday, the 26th day of November, A. D. 1894, at twelve o'clock m. on that day, to do, submit to, and receive all and singular those things which shall then and there be considered of him in this behalf.

And have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Norfolk, this 21st day of November, A. D. 1894.

[SEAL.] M. F. PLEASANTS, *Clerk.*
By H. S. ACKISS, *Deputy Clerk.*

5 *Marshal's return.*

Executed Nov. 21, 1894, by serving a certified copy of within writ on Lieutenant F. H. Tyler, in charge of the body of David B. Sayre, on board Boston steamer "Fairfax," then lying at her wharf in Norfolk, Va.; and by serving a similarly certified copy on Lieutenant T. W. Ryan, officer in command of the receivingship "Franklin," on board of said ship then lying off navy-yard at Norfolk, Va.

J. M. HUDGIN, *U. S. Marshal.*
By THOMAS H. CROSS, *Deputy Marshal.*

6 *Return made by Lieutenant T. W. Ryan, in the absence of Capt. M. L. Johnson, to the writ of habeas corpus allowed in this cause.*

U. S. R. S. "FRANKLIN,"
Navy-Yard, Norfolk, Va., Nov. 26, 1894.

Captain M. L. Johnson being absent on public duty in Washington, I make the following return:

Pay Clerk D. B. Sayre was arrested on the 10th day of Oct., 1894, to await investigation of charge of embezzlement. Was tried by court-martial on the 30th Oct., after having been recommended for such trial by court of inquiry which met at the navy-yard on the 16th of Oct. He was subsequently held by virtue of the following order:

NAVY DEPARTMENT,
Washington, Nov. 17, 1894.

SIR: Pay Clerk David B. Sayre, recently tried by general court-martial at the navy-yard, Norfolk, Va., was found guilty of the charge of "embezzlement" in violation of article 14 of the articles for the government of the Navy, and sentenced to be confined in such place as the honorable Secretary of the Navy may designate for the period of two (2) years, to lose all pay that may become due him during such confinement, except the sum of ten (10) dollars per month, and a further sum of one hundred and fifty (150) dollars, to be paid at the expiration of confinement, the total loss of pay amounting to two thousand two hundred and ten (2,210) dollars, and then to be dishonorably dismissed from the naval service of the United States.

The proceedings, finding, and sentence of the general court-martial in the case of Pay Clerk D. B. Sayre, U. S. Navy, have been approved.

7 You will, upon the receipt of this communication, inform Pay Clerk D. B. Sayre of the result of his trial, and have him trans-

ferred under a suitable guard to the prison at the navy-yard, Boston, Mass., where he will be confined in accordance with the terms of his sentence.

The period of confinement to take effect from this date.

Very respectfully,

(Sg'd) H. A. HERBERT,
Secretary of the Navy.

The Commandant, navy-yard, Norfolk, Va.

Sent to the receiving ship for the guidance of the commanding officer.

THOS. W. RYAN,
Lieut., U. S. Navy.

8 *Supplemental petition of David B. Sayre.*

In the circuit court of the United States for the eastern district of Virginia.

To the Hon. ROBT. W. HUGHES, *Judge of the said Court:*

The supplemental petition of David B. Sayre respectfully represents that heretofore, to wit, on the 21st day of November, 1894, he presented to your honor, as judge of this honorble court, his petition setting forth that he was illegally detained in the custody of one Capt. M. L. Johnson, commander of the U. S. S. "Franklin," at the Norfolk Navy-Yard, and praying that a writ of habeas corpus might be awarded to him, directed to the said Capt. M. L. Johnson, commanding him to produce the body of your petitioner before this honorable court, at the city of Norfolk, Va., at such time as the conrt should direct, with the cause of your petitioner's detention, to the end that your petitioner might be discharged from such custody; which said writ was, on the 21st day of November, 1894, duly awarded returnable at Norfolk, Va., on the 26th day of November, 1894, at 12 o'clock m.

Your petitioner, relying upon the several charges and allegations in the said petition contained, but for further charges and allegations setting forth the said illegal detention, and supplemental to the said petition, further respectfully represents:

First. That your petitioner was, on the 10th day of October, 1894, arrested and placed in close confinement on the said U. S. S. "Franklin," at the said Norfolk Navy-Yard, and so detained in close confinement until the 26th day of October, 1894, without being informed of the nature
9 and cause of the accusation; that on the said 26th day of October, 1894, for the first time, and sixteen days after his said arrest and confinement, he was informed of the nature and cause of the accusation by being served with a copy of the charge and specification on which he was tried by the said naval general court-martial.

Second. That on the 30th day of October, 1894, your petitioner, in the custody of a guard, was taken before the said court-martial, when he was arraigned, and the said charge and specification was then and there read to him. Upon which said arraignment your petitioner first pleaded to the jurisdiction of the court, but his plea to the jurisdiction was overruled. He then filed a demurrer to the said charge and specification, but his

demurrer to the said charge and specification was overruled. He then pleaded not guilty to the said charge and to the said specification, and thereupon the said court commenced to take testimony to sustain the said charge and specification, and the taking of the said testimony continued until November 1st, 1894, when the judge advocate announced that the prosecution closed, and the court adjourned to the following day.

Third. That on the 2nd day of November, 1894, immediately after the reassembling of the said court and the reading of the record of the preceding day, your petitioner moved the said court to exclude all of the testimony introduced at said trial, which said motion the said court overruled; that the said motion of your petitioner, to exclude all of the testimony introduced at the trial, was in accordance with the law of the U. S. by which courts-martial are governed, and should have therefore been sustained by the said court and the said testimony excluded, which would have resulted in an acquittal of your petitioner; that the
10 failure of the court to sustain the said motion renders its sentence and judgment against your petitioner absolutely null and void.

Fourth. That your petitioner, as clerk to J. E. Cann, a paymaster in the Navy of the U. S., was engaged in duty on land in time of peace; that the status of the paymaster is the status of his clerk; that the said J. E. Cann, as paymaster, was doing duty on land as paymaster at Port Royal, general storekeeper at Port Royal, and purchasing paymaster at Port Royal, and also as a member of the statutory board in the U. S. Navy-Yard at Norfolk, Virginia.

Fifth. That the said J. E. Cann, as paymaster of the U. S. S. "Franklin," in connection with his other shore duties, and for the purpose of determining the jurisdiction of trial by courts-martial, did not and could not make his duties those of duties at sea; that the U. S. S. "Franklin" has long been the receiving ship at the U. S. Navy-Yard at Norfolk, and is totally unfit and incapable of performing sea duty.

In tender consideration whereof your petitioner humbly prays that this, his supplemental petition, may be taken and treated as a part of his petition heretofore presented, upon which a writ of habeas corpus was issued, requiring that the body of your petitioner be produced before this honorable court to be dealt with according to law; that your petitioner may be released and finally discharged from said illegal detention and confinement.

And your petitioner will ever pray, &c.

D. B. SAYRE.

Subscribed and sworn to before me this 26th day of November, 1894.

H. S. ACKISS,
Clerk U. S. District Court, East. Dist. of Va.

11 *Proceedings had in open court on November* 28, 1894.

In the circuit court of the United States for the eastern district of Virginia.

In re David B. Sayre, on a petition for a writ of habeas corpus. Before the Honorable Robert W. Hughes:

WEDNESDAY, *November 28th*, 1894.

Appearances: Hon. Francis R. Lassiter and L. W. T. Waller, esq., for the United States; Mess. John W. Happer and A. E. Warner for the petitioner.

Counsel for the petitioner offered in evidence a copy of the record of the proceedings of the court-martial, so far as the facts stated in that record relate to the questions before this court, to the admission of which counsel for the United States objected. The court overruled the objection and admitted the record, to which ruling of the court counsel excepted, and the same is filed, marked Exhibit A.

It is admitted that Paymaster Cann and the accused for three years previous to his service on the U. S. R. S. "Franklin" were at sea.

Counsel for the United States offered in evidence a letter from the Secretary of the Navy transmitting the order for a court of inquiry, and the same is filed, marked Exhibit B. Counsel for the United States offered in evidence extracts from the ship's log of the U. S. S. "Franklin," relating to the arrest and detention of the accused, and the same are filed, marked Exhibit C.

12 Counsel for the United States next offered in evidence the following described papers, viz:

Precept convening a court of inquiry to investigate the books and accounts of the pay department of the U. S. R. S. "Franklin."

Letter dated October 13, 1894, to Pay Clerk David B. Sayre, U. S. Navy, informing him of his right to be present before said court of inquiry.

Letter dated October 25, 1894, informing Sayre of the findings of the court of inquiry.

General court-martial order No. 102, dated November 17, 1894, containing the charge and specification in the case of Pay Clerk Sayre, which is herewith filed, marked Exhibit D.

Counsel for the United States next offered in evidence the appointment and qualification of the prisoner as paymaster's clerk, which was also filed, marked Exhibit E.

13 *Petitioner's Exhibit A.*

Proceedings of a naval general court-martial, convened at the navy-yard, Norfolk, Virginia, on Tuesday, the thirtieth day of October, in the year 1894, by virtue of an order signed by H. A. Herbert, Secretary of the Navy, the original of which is appended to this record, marked A.

NAVY-YARD, NORFOLK, VIRGINIA,
12 *m. o'clock, Tuesday, October* 30, 1894.

The court met pursuant to the above-mentioned order.

Present: Captain John R. Bartlett, U. S. N., president; Pay Inspector Robert P. Lisle, U. S. N.; Paymaster John B. Redfield, U. S. N.; Lieutenant Nathan E. Niles, U. S. N.; Lieutenant Clinton K. Curtis, U. S. N.; Paymaster William W. Galt, U. S. N.; Lieutenant Burns T. Walling, U. S. N.; Lieutenant Thomas W. Ryan, U. S. N.; First Lieutenant John A. Lejeune, U. S. M. C., members, and First Lieutenant Littleton W. T. Walker, U. S. M. C., judge advocate.

The accused, David B. Sayre, pay clerk in the United States Navy, attached to and serving as such on board the United States receiving ship "Franklin" at the navy-yard in Norfolk, Virginia, was brought before

the court, and acknowledged that he had received a copy of the
14 charge and specifications. The accused being asked if he desired counsel replied that he wished Messrs. John W. Happer and A. E. Warner, who were accepted by the court.

The judge advocate read aloud the order convening the court, and asked the accused if he had any objection to make to any of the members therein named sitting on his trial, and he answered that he had not.

The oaths required by law were then administered, according to law, in the presence of the accused, first, by the president of the court to the judge advocate, and, second, by the judge advocate to each of the members of the court.

The judge advocate here read aloud letter from the Secretary of the Navy, authorizing the employment of a stenographer (appended, marked B). Mr. Reading Stoddard, stenographer, was duly sworn, in accordance with section 1737 of the Naval Regulations of 1894.

The court was here cleared for the consideration of the charge and specification, the parties to the trial and the stenographer withdrawing.

The court was here opened, the judge advocate, the accused, his counsel, and the stenographer entering.

The charge and specification drawn up in due form and technically correct.

The judge advocate read aloud the charge and specification (appended, marked C) preferred against the accused by the Secretary of the Navy; also letter of transmittal of same (appended, marked D), and asked the accused if he was ready for trial, to which Mr. Happer, of counsel for accused, replied:

15 May it please the court, before he responds to that I desire to have here noted our objection to the jurisdiction of this court. I also desire to enter a demurrer, setting forth that the charge and specification are not sufficient in law.

By the JUDGE ADVOCATE. Will you argue first?

By Mr. HAPPER (of counsel for accused). I have no objection to presenting my views to the court, if they are willing to hear me.

By the COURT. You have not any written statement?

By Mr. HAPPER (of counsel for accused). No, sir.

By the COURT. Then the court will be very glad to hear from you, if you will make it as brief as possible.

By Mr. HAPPER (of counsel for accused). I expect to be very brief in respect to the matter. The ground upon which my plea as to the jurisdiction extends is this: That the defendant here, David B. Sayre, is a paymaster's clerk. He is therefore a civilian, and not liable to the regulations of the Navy and subject to a naval court-martial. That is entirely a question of law, and similar questions of that kind have been disposed of, I understand, by the courts of the United States, of which the judge advocate of this case has some knowledge.

The ground upon which my demurrer is made is, first, that the demurrer embraces really the ground of the jurisdiction of the court, because the charge and specification sets forth the office held by the defendant, that he is a paymaster's clerk, and that, of course, will show in a legal sense whether or not he is subject to the jurisdiction of this court.

The further ground of my demurrer is this: That the specifi-
16. cations do not set forth, in my judgment, a charge of embezzlement. If the facts are true, as stated in this charge, they constitute what is known as a larceny or a theft, and not embezzlement. They are distinct and separate offenses, entirely so. A theft is the taking of the goods of some personal value belonging to another, with an intention of depriving the owner thereof permanently. An embezzlement is the taking of the goods of another when they have been committed to the charge of the taker with authority and management and control. A bare possession of the goods, taken by the person who has that bare possession, does not constitute embezzlement. It is a larceny. And you will find, I think, by examining authorities that that question has been settled in a number of instances by various Secretaries of the Navy. I understand the law to be that a paymaster is solely vested with the management and control of the moneys of the Government; that he has no power whatever to delegate that authority; that he has no right to part with a cent, except in accordance with the laws of the United States; that he has no right to turn over to his clerk with any degree of management and control any part of the moneys of the Government which have been committed to his charge and his keeping, and he cannot delegate his authority.

In an opinion delivered by Secretary Robeson, in the case of Captain Frank Monroe, of the Marine Corps, the Secretary: No; that is not the case which I refer to. Secretary Welles, in the case of a charge against Rufus C. Spalding, he says in his opinion:

Paymasters may not delegate any part of their responsibility to their
subordinates. Government property, drawn upon the requi-
17. sition of a paymaster, is charged to him, and he is held to answer for any loss occurring through his negligence or that of his subordinates, and I claim that if he invests his subordinate with any property which is thus drawn to his charge and keeping, it can only be for temporary use, and not for a property use, and there being no property use and conversion of that property to his own benefit, is a larceny and not an embezzlement. If you give your hat to a boy to carry to a certain place, to be delivered to a person, and he steals that hat, he is guilty of larceny and not of embezzlement. If you leave property with a person with a degree of ownership in it, and the management and control of it not restricted by law or otherwise, and he uses it, then he is guilty of embezzlement. If he uses it for his own purpose, then he is guilty of larceny. That is the distinction between larceny and embezzlement. And I claim, therefore (of course I desire to be brief), that these specifications set forth that he is a paymaster's clerk. In other words, the law conveys, then, to your mind the idea that he is not invested with any of the moneys of the Government of the United States; that if he comes into the possession of any moneys of the United States, he comes into it either by taking it or by the delivery to him by a person who had no right to deliver it to him, and who could not by any possible means vest him with a property interest, and not, therefore, become vested with property interest in it under the laws of the United States. If he appropriated the money to his own use, he was guilty of larceny and not of embezzlement.

18 By the JUDGE ADVOCATE. It is necessary to consider, first, the question of jurisdiction. It is well to understand what is meant

in law by jurisdiction. I cite one of the cases that the counsel refers to, that of The United States versus Bogart. Bogart was a pay clerk serving on board a receiving ship. It is unnecessary for me to call the attention of the court to the case other than to hand in the official general court-martial order, which will be appended to the record (marked E), giving a description of it and the Secretary's comments on it. It is General Order No. 143. I will simply refer to the case.

"The power to hear and determine a cause is jurisdiction. The distinction between jurisdiction and its exercise pointed out.

"Congress has power under the Constitution to provide for the trial and punishment of offenses committed in the naval service by courts-martial, without indictment or the intervention of a jury.

"The power of Congress to provide for the government of the land and naval forces is not affected or limited by the fifth, or any other amendment.

"That branch of jurisdiction under military law given in the acts of Congress prescribing rules and Articles of War, or otherwise providing for the government of the national forces, may be exercised 'in peace and war.'

"The clause in the fifth amendment to the Constitution, 'when in actual service in time of war,' has no reference to the Regular Army or to the Navy, but refers only to the militia.

"An offense committed by a party while actually in the naval service is a 'case arising in the naval forces,' within the meaning of these terms, as used in the fifth amendment of the Constitution; and Congress has power to authorize the trial for such an offence by a court-martial, upon proceedings commenced after the connection with the service of the party charged has been severed."

19

That question will not arise in this case. It is referred to in the decision of which the counsel said I had some knowledge.

In a decision in the case of the United States versus Van Vranken, I was the original counsel in his case. I am sorry to say that I was wrong at that time.

I will read the decision of the learned Judge Hughes of the circuit court of the United States for this district:

"It is true that there are exceptions to rules of procedure even as sacred as those just described as essential to the freedom and safety of the citizen. Persons who belong to the Army and the Navy, in which summary trial under the martial law is necessary to discipline and to the efficiency of those organizations, are not entitled to the legal privileges which have been mentioned as belonging to every citizen. The officer, or soldier, or sailor of the Army or Navy voluntarily surrenders the rights of the citizen in this respect when he enters or enlists in those services; and he therefore cannot complain of the method of trial, or the sentences of military courts, so long as they conform to military usage and to the laws of the land relating to the Army and Navy."

You are aware of the fact that the point raised in this case was that Van Vranken was a pay clerk serving on shore duty, and at that time there was a clause in the regulations of the Pay Corps of 1878 which apparently had not been revoked. The origin of that was a letter, not a question of jurisdiction. This regulation appears to have been

20

taken from a letter of the Secretary of the Navy, Mr. Borie, to the Fourth Auditor of the Treasury, dated June 1st, 1869, in reference to instructions which have been given for the guidance of pay officers, under General Order No. 75, May 23d, 1866. I will submit General Order No. 75 for the inspection of the court [examined by counsel for accused], relating to compensation for quarters, and also for an expression of opinion by the Secretary of the Navy, in a communication dated June 10, 1869, to the Attorney-General, requesting to be advised as to the status of pay clerks at shore station, and in regard to which the Attorney-General addressed a letter to Mr. Borie's successor, Mr. Robeson, in November, 1869, stating that he would not give an opinion upon the question unless desired by him to do so. This letter is on file at the Department without any endorsement, and nothing further appears to have been done in the matter, It would seem, in view of the decision of Judge Benedict in the case of Bogart in May, 1869, just prior to the trial of the latter, and of the Supreme Court of the United States in the case of Reed, in 1879, that the said regulafion of the Secretary of the Navy of June 11, 1869, was inconsistent with law and therefore null and void.

It is well to consider the appointment of paymaster's clerks. I will submit to the court, and have appended to the record, a certified copy of the letter of acceptance, the letter of appointment, and the letter of acceptance of Pay Clerk Sayre (marked D).

21 You will observe that that oath and the oath administered to marines when they enlist, with the exception of the paragraph referring to bounty, allowance, &c., are practically the same. The oath of marines is as follows:

"I solemnly swear that I will bear true allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies and opposers whomsoever, and observe and obey the order of the President of the United States and the orders of the officers appointed over me, according to the rules and articles for the government of the Army and Navy of the United States."

The only difference is that these men would be subjected to the Articles of War for the Army, and they can be transferred at any time, and a pay clerk can not.

You nave seen the source of his appointment and his oath and the form of the oath of allegiance. The latter is as follows:

"I do solemnly swear that I will support and defend the Constituion of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God."

That is the oath of office that he took when he entered. Unfortunately they have not sent to me a certified copy of that oath, but his position for the past year as paymaster's clerk is certainly presumptive evidence that he took that oath at that time, that being the regulation.

22 In regard to the case of the United States versus Reed, 1879 (Otto., 100, p. 13), Pay Clerk Alvin R. Reed, tried on board U. S. S. "Essex," by order of Rear Admiral E. T. Nichols, charged with a violation of article 14, section 1624 of the Revised Statutes of the United

States, the court pronounced a sentence of two years' imprisonment in such place, &c., which the Secretary of the Navy shall direct, to lose all pay which may become due him during such continuance, excepting the sum of $10 per month, this loss amounting to $1,960; to be fined in the sum of $500, which fine must be paid before or at the end of the term of confinement. Should such fine not be paid at end of term of confinement, to be detained in confinement without pay until such fine be paid, and at the expiration of the term of confinement to be dishonorably dismissed from the naval service of the United States. While in confinement under sentence, on board a naval vessel at Boston, the petitioner sued out a writ of habeas corpus, and brought his case before the circuit court of the United States for the district of Massachusetts. After a full hearing that court adjudged against him, and ordered him back into the custody of the naval officer to whom the writ was addressed. Under date of September 3, 1879, he petitioned the Supreme Court of the United States for discharge from custody. Upon a hearing by said court, the application of the prisoner was denied. The decision of the Supreme Court of the United States was that a regularly appointed clerk of a naval paymaster is a person in the naval service of the United States within the meaning of the law, and for a violation of its provisions he is subject to be tried and convicted by a naval general court-martial. That is the decision of the Supreme Court of the United States.

23 By the COURT. What date?

By the JUDGE ADVOCATE. 1879, October term. This decision does not specify the particular class of duty; that is, whether serving at sea or on shore, and consequently embraces all.

In the event that the question should arise whether the pay clerk of a receiving ship is on shore duty, to avoid any complication, I will read you a decision of the Supreme Court of the United States in the case of Strong. This is United States versus Strong, an appeal from the Court of Claims, submitted April 2, 1888, and decided April 16, 1888 (U. S. Reports, October, 1889, vol. 125). The claim was based on the decision in the case of the United States versus Symonds (U. S. Reports, 120–46). In this case it is stated in the opinion of the court—the Attorney-General and the Assistant Attorney-General Howard appearing for the appellant, and Mr. Linden Kent for the appellee—Mr. Justice Matthews delivered the opinion of the court, and I wish you would pay strict attention to the description. He says:

"From the findings of the facts it appears that the 'Wabash' is a receiving ship, built of wood, about 31 years old, stationed at the navy-yard at Boston for over twelve years past. The vessel is and has been used as a naval recruiting station while at the Boston Navy-Yard. There is a roof built over the deck. The ship is connected and communicates with the shore by a rope. There is a large boat or a scow that *piles* between the ship and the wharf by means of a crank, and connected with a rope, etc. All the anchors have never been taken up at the same time. Row boats are also used in going to and from the ship. In the case of U. S.

24 vs. Symonds (U. S. Rep., 120, 46, 50), it was decided: "That the sea pay given in par. 1556 may be earned by services performed under orders of the Navy Department in a vessel employed with authority of law, in active service in bays, inlets, roadsteads, or other arms of the

sea, under the general restrictions, regulations, and requirements that are incident or peculiar to service on the high sea. It is of no consequence in this case, says the justice, that the 'New Hampshire' was not, during the period in question, in such condition that she could safely be taken out to sea beyond the mainland. She was a training ship, anchored in Narragansett Bay during the whole time covered by the claim of appellee, and was subject to such regulations as would have been enforced had she been put in order and used for purposes of cruising, or as a practice ship at sea. Within the meaning of the law, Symonds, when performing his duties as executive officer of the 'New Hampshire,' was at 'sea.'"

"We are unable to find any distinction between the present case and that of Symonds. It results that the claimant was entitled by law to pay for sea service. The judgment of the Court of Claims is accordingly."

The definition of "at sea" is too clearly understood by the counsel, I think, to be denied in this case.

Thus we have the appointment, the oath of office, the letter of acceptance, the decision of the Supreme Court of the United States, and the decision of the district court, the decision of the circuit court. We have all these cases, and there are other cases, if the court wishes to hear, I can cite. The result is the same in each case, except in the case
25 of Van Vranken. Therefore, from these decisions and the Strong case, you will see that David B. Sayre is a person belonging to the military establishment of the Navy serving on board ship; that he is a person belonging to the military establishment of the Navy serving on board ship at sea. Therefore, he is a person in the employ of the United States, within the meaning of article 14, section 1624 of the Revised Statutes of the United States, and, for violation of its provision, is subject to be tried, convicted, and sentenced by a naval general court-martial. As to the latter part of the demurrer, I will simply read you from Winthrop's Military Law as to embezzlement, page 1012, volume 1:

"To prove the offense under the article, it is only necessary to prove that the accused was (1) servant or agent of owner or maintained fiduciary relation toward him; (2) that he received into his possession the money or property of such owner; (3) he received it by virtue of his employment or fiduciary relation; (4) that he fraudulently converted it to his own use."

Unquestionably, the relation between Mr. Sayre, the accused, and the paymaster is, I think, fiduciary. I think the court will agree that he had been ordered by the Department to perform this duty to assist the paymaster.

As to the question of paymasters not having the authority to delegate their authority to the pay clerk of a ship—in this particular case the Navy Department has ordered the paymaster of the ship to perform several duties, one of them taking him from his station as much as six consecutive days during the quarter; another duty taking him
26 two days each month; and in addition to his duties in connection with the yard, he is on the statutory board of survey, which sometimes keeps him away for a day.

It seems unreasonable to suppose that the business of a receiving ship should stop and the Government by put to the unnecessary expense of extra pay in case of men being discharged, if that authority is not delegated to a pay clerk. The Department knew this. It has known it ever since the Pay Corps itself was established, I suppose.

If the duties and responsibilities, to some extent are conferred, be delegated to the pay clerk by the paymaster, the paymaster is responsible civilly. He has given bonds, and he is responsible for the defalcation. In this particular case he has made up the loss. But the very fact that these courts, every since 1869, have been trying pay clerks for the same offense, the Department regards it as necessary that at times paymasters should delegate this authority to the pay clerk.

You have seen the decision of the Supreme Court of the United States in which the question has been argued in five, six, or seven different cases fully and completely, and that has been the decision.

As to jurisdiction, the pay clerk in the naval service of the United States within the meaning of the article 14, section 1624 of the Revised Statutes, and for the violation of its provisions is subject to be tried, convicted, and sentenced by a naval general court-martial.

By Mr. HAPPER (of counsel for the accused). I have no desire
27 to reply. I only wanted to state the position, for the benefit of the court, that I assumed in this matter. I did not come over with authority really to argue the question. I thought it was fair to the court, especially inasmuch as the court allowed me to do so, to state the position which I assumed under the pleas which I filed.

I hope, however, before this court is closed, if the court will hear argument on the facts and on the decision which they are to render, that I will be given an opportunity to present my views more fully on this subject.

The court was here cleared, the judge advocate, the accused, his counsel, and the stenographer withdrawing.

The court was reopened, the judge advocate, the accused, his counsel, and the stenographer entering.

Decision.

By the COURT. The court has considered the arguments of the counsel for the accused and the judge advocate, and decides that it has jurisdiction in this case, and demurrers in regard to the specifications are overruled.

(Addressing the judge advocate). Are you ready to proceed with the charge and specifications?

By the JUDGE ADVOCATE. Yes, sir.

Arraignment.

By the JUDGE ADVOCATE. I call for the accused to plead.

28 You, D. B. Sayre, pay clerk in the United States Navy, have heard the charge and the specification of the charge preferred against you by the Secretary of the Navy; what say you to the specifications of the charge, guilty or not guilty?

Answer by the accused. Not guilty.

By the JUDGE ADVOCATE. What say you as to the charge, guilty or not guilty?

Answer by the accused. Not guilty.

Paymaster JAMES E. CANN, U. S. N., called as a witness on the part of the prosecution, duly sworn according to law by the president of the court in the presence and hearing of the accused, testified as follows:

Direct examination:

1. Question (by the JUDGE ADVOCATE). What is your name, rank, and present duty?

Answer. James E. Cann, paymaster of the Navy; paymaster of the "Franklin." I am also paymaster at Port Royal, general storekeeper at Port Royal, and purchasing paymaster at Port Royal; also member of the statutory board in the yard. I am paymaster of the "Franklin." I am also paymaster of the "Monitor" at Richmond.

2. Question (by the JUDGE ADVOCATE). How long have you been attached to the "Franklin?"

Answer. Since the 15th July, 1893.

3. Question. Do you recognize the accused; if so, as whom?

Answer. I recognize him as pay clerk of the "Franklin," D. B. Sayre.

4. Question (by the JUDGE ADVOCATE). In discharging your
29 numerous duties is it necessary that you be absent from the ship "Franklin?"

Answer. It is.

5. Question. How long at Port Royal, consecutively—how many days?

Answer. Oh, about 5 or 6 days, I guess.

6. Question. At the monitors at Richmond?

Answer. About 2 days, or 2½.

7. Question. During what time was that, every quarter?

Answer. Every month.

8. Question. And the 5 or 6 days is during the quarter at Port Royal?

Answer. At Port Royal.

9. Question. When you are absent from the ship on duty has it been necessary for you to leave money in the possession of the pay clerk?

Answer. It has.

10. For what purposes?

Answer. To carry on the business, and to meet bills when they come due.

11. Question. You were in the habit of delivering sums of money into the hands of your clerk for these purposes?

Answer. Yes.

12. Question. When you were absent from the ship?

Answer. Yes.

13. Question. What method, what form of acknowledgment, did you take from your clerk?

30 Answer. I took a receipt made out——

14. Question. What is the difference between this receipt and any other, for instance, this and an officer's?

Answer. There is no difference.

15. Question. Was there any other endorsement or legend on this receipt; anything relating to what purposes the money was to be used?

Answer. I do not understand the question exactly.

16. Question. Was there any other mark on the receipt other than the printed form?

Answer. Oh, sometimes.

By Mr. HAPPER (of counsel for accused). May I ask, Do you propose to introduce the receipt?

By the JUDGE ADVOCATE. Yes.

By Mr. HAPPER (of counsel for accused). Because I should object to this testimony unless the receipt is introduced, because it would show for itself on the claim.

By the JUDGE ADVOCATE. The receipt itself will be introduced and identified.

17. Question. Is this receipt in the usual form [handing receipt to witness]?

Answer. The usual form. The form that I use.

18. Question. And you gave money to the pay clerk on it?

Answer. I took his receipt in that form.

By the JUDGE ADVOCATE. Receipt appended to the record, marked G.

19. Question. What do you mean by that expression balance?

31 Answer. It is the balance in the hands of the pay clerk on that date.

20. Question. For Government use?

Answer. For Government use.

21. Question. How did he account to you for the expenditure of this money?

Answer. How did he account to me?

22. Question. How did he do it—in what manner?

Answer. Once a week he would present me with a written statement of the account under the various heads, and I would enter it up in my cash book, and would deduct that amount from his receipt, and take his receipt for the balance.

23. Question. When he got the money from you, did he ever have a balance of cash on hand according to his statement?

Answer. I never examined his cash.

24. Question. How were you ordered to Port Royal? From whom did you receive the order?

Answer. From the commandant.

25. Question. The commandant of this station?

Answer. The commandant of this station.

26. Question. When was your last visit to Port Royal; that is, when did you leave the "Franklin?"

Answer. On the 1st of October.

27. Question. And when did you return?

Answer. I returned on the 5th.

28. According to this receipt on the 1st day of October, 1894, your

32 pay clerk, D. B. Sayre, had already stated that he had in his possession for Government use $2,701.44. Is that so?

Answer. Yes.

Question. Did he, before giving you the receipt, submit an account of the disbursements of the amount given to him the last time he required money?

Answer. Well, I always took—he always submits an account, and that is after those receipts are given.

29. Question. Did he ask for money before you left for Port Royal on your last visit when he gave you this receipt? This reads a balance. Did he ask you for money at that time?

Answer. I can not recall whether he did.

30. Question. When was the last time all the cash was counted on the ship?

Answer. The last time—on the 10th day of October.

31. Question. And by whom?

Answer. By Pay Director Schenck.

32. Question. Was all the cash called for by the accounts on hand at that time?

Answer. It was not.

33. Question. How much was it short?

Answer. $1,971.11, I think.

34. Question. Had you any knowledge of this shortage before the examination made by Paymaster Schenck?

Answer. I had a knowledge of it a few moments before when I was told of it by the pay clerk.

35. Question. Will you relate in detail how you first received intimation of the shortage?

33 Answer. I went into my room—my stateroom—and was in the act of unlocking my safe to get out my books, and Mr. Sayre came into the room and stated that he was about $2,000.00 short. That was my first intimation.

36. Question. What did you do?

Answer. I immediately asked Mr. Schenck to come down, and I informed him of the deficiency.

37. Question. Did the accused make any further statement?

Answer. He did.

38. Question. What was it?

Answer. He stated to Mr. Schenck that I knew nothing about it.

39. Question. Did you have any reason to suspect that there was any amount short before the confession made by the clerk?

Answer. None whatever.

40. Question. Were the accounts examined and the cash counted at that time?

Answer. Yes.

41. Question. What was the result of the examination?

Answer. The result was that the shortage was found to exist.

42. Question. How much?

Answer. There was 30c. more than was shown there, $1,971.41 on the first examination.

43. Question. Was there a subsequent examination made?

Answer. The following day there was a subsequent examination made, and the amount was shown to differ from the first by 30c.

34 44. Question. And what was the actual amount of the shortage?

Answer. $1,971.11.

45. Question. What steps were taken after the confession was verified?

Answer. Mr. Schenck and myself went to the captain, and Mr. Schenck reported the matter. The captain then directed me to report to him in writing.

46. Question. From the time you joined the ship, on the 15th day of July, 1893, to October 10th, 1894, did you, from time to time, entrust sums of money to your pay clerk to be used for Government purposes?

Answer. I did.

47. Question. Did you have any other moneys in the safe besides Government money?

Answer. Any other money?

48. Question. Yes.

Answer. Yes; I had my own at times in the safe.

49. On October 10th?

Answer. No; well, no. No; there was no other money on October 10th except Government money.

50. Question. Then the shortage that existed was in the Government money?

Answer. Yes; Government money in the hands of the pay clerk.

51. Question. To be disbursed for Government purposes?

Answer. Yes.

52. Question. Is that right?

Answer. That is right.

35 53. Question. Have you any knowledge of when the shortage or any portion of it occurred?

I have not.

Cross-examination:

54. Question (by Mr. HAPPER, of counsel for accused). Will you please explain what are the duties of a pay clerk in reference to the care of money entrusted to him?

Answer. What are the duties?

55. Question. Yes, sir.

Answer. They are supposed to take proper care of it.

56. Question. Well, what disposition.

Answer. What——

57. Question. What disposition is he required to make of it?

Answer. To make the disbursements according to orders, and according to requirements.

58. Question. Are the duties prescribed by law or by the regulations of the Navy Department?

Answer. The duties of a pay clerk?

59. Question. No, sir; of the paymaster.

Answer. By the regulations, I think.

60. Question. Is the paymaster required to keep the funds entrusted to him in bank?

Answer. He is; that is, a portion of it.

61. Question. What portion?

Answer. Any portion that he thinks is necessary; a large proportion to keep in bank, and whatever is necessary to keep on board the ship.

36 62. Question. What are the duties of a pay clerk?

Answer. To carry out the orders of the paymaster. That is about as near as I can give.

63. Question. Then he is subject to the management and control of the paymaster?

Answer. Yes, sir.

64. Question. What duties did the defendant perform under your management and control?

Answer. The duties of a pay clerk.

65. Question. Well, that is rather indefinite. Did he keep the accounts of the paymaster?

Answer. He kept the rolls, and kept the accounts; a portion of it.

66. Question. Did he keep the funds of the paymaster?

Answer. Only what was entrusted to him by the paymaster.

67. Question. What was the amount usually entrusted?

Answer. It varied.

68. Question. Sir?

Answer. It varied.

69. Question. It varied. What disposition was to be made of the funds entrusted to the pay clerk?

Answer. To make payments as required.

70. Question. On what kind of vouchers were those payments to be made?

Answer. Well, many kinds—orders of discharge, orders for the payment of money to the men and officers.

71. Question. What are the rules governing the paymaster in reference to the payment of moneys in his hands?

37 Answer. What are the rules?

72. Question. Yes, sir.

Answer. All money paid out to enlisted men is done by order of the commanding officer.

73. Question. On the order of the commanding officer; these are moneys paid out to enlisted men?

Answer. Yes; money paid out to officers requires no order from the commanding officer.

74. Question. I find from article 1489 of the United States Navy Regulations the pay officer will issue money to petty officers and persons of inferior rating and marines only in such sums and at such times as shall be directed in writing by the commanding officer, and all such issues must be in the presence of an officer of the division to whom the men belong. Was that article faithfully carried out in respect to the duties of your office?

Answer. It was; no payments were ever made except they were witnessed by an officer.

75. Question. And as directed by——

Answer. According to the regulations.

76. Question. According to the regulations. The pay officer, article 1490 prescribes the pay officer shall, except when prevented by an exigency of the service to be determined by the commanding officer, be present and personally superintend all the issues of money and the receipting therefor. Was that provision carried out?

Answer. It was carried out.

77. Question. Was the money which you issued to your pay clerk issued on the authority of the commanding officer?

Answer. Was the money that I gave him?

38 78. Question. Yes, sir.

Answer. No; that requires no order.

79. Question. Will you refer me to any article of the law which authorizes you to pay money to your pay clerk other than these references to which I have called your attention?

Answer. There is no regulation that says I cannot do it.

80. Question. There is no regulation that says you cannot do it?

Answer. No, sir.

81. Question. Then the moneys which you gave to him you were not directed to give to him by the commanding officer?

Answer. No.

82. Question. Is there any regulation or article which says you may do so?

Answer. Not that I am aware of. There is no regulation bearing on the subject.

83. Question. You pay from the moneys which you receive the enlisted men, you say? Were these enlisted men on the ship "Franklin?"

Answer. Yes.

84. Question. Were there any other than the "Franklin?"

Answer. Well, enlisted men on the monitors, which I paid myself.

85. Question. At any other point than the monitors?

Answer. At Port Royal, which I pay myself.

86. Question. How are your moneys paid, in cash or by check?

Answer. Well, they go to the "Franklin."

87. Question. At any and all points?

Answer. The monitors are paid in cash, and of course, if a man is discharged during the month he is paid by check. I only go
39 to the monitors once a month. There are men discharged during the month at intervals during any quarter, and those men are paid by check.

88. Question. In other respects, on the monitors they are paid by cash?

Answer. In cash once a month in person by myself.

89. Question. How are the payments made at Port Royal?

Answer. On the third month they are paid in cash, on the other two months they are paid by check drawn by me.

90. Question. How are they paid on the "Franklin?"

Answer. In cash.

91. Question. At what times are the payments made on the monitors?

Answer. On the end of the month as a rule.

92. Question. Is there any time absolutely fixed for the payment of the money on the monitors?

Answer. It is customary to pay off at the end of the month.

93. Question. Is there any time fixed by law for the payment of the money on the "Franklin?"

Answer. No.

94. Question. Is there any time fixed by law for the payments which you made at Port Royal?

Answer. No.

95. Question. You stated in your direct examination that the duties of your office require you to be absent at times from the "Franklin?"

Answer. Yes.

96. Question. Attending the payment of the monitors, and at Port Royal?

Answer. Yes.

40 97. Question. Was this absolutely necessary?

Answer. Absolutely necessary.

98. Question. In the performance of your duties on the "Franklin?"

Answer. Absolutely necessary.

By the JUDGE ADVOCATE. He has stated that he went to Port Royal in obedience to orders.

99. Question (by Mr. HARPER, of counsel for the accused). But I understand you to state that there is no special time fixed by law for payment on the "Franklin?"

Answer. There is no special time fixed by law for payment on the "Franklin."

100. Question. I understand you to say that you went on the first of the month and returned on the fifth, by order of the commandant, to Port Royal. May not your payments have been made before the first or after the fifth on the "Franklin?"

Answer. May they not—how is that?

101. Question. May not your payments have been made before the first, or after the fifth, after your return, on the "Franklin," without a violation of the law?

Answer. I do not understand your question. There are two pay days on the "Franklin," in the middle of the month and at the end of the month. There are payments made every day when men are discharged.

102. Question. How often were you required to go to Port Royal?

Answer. Once in three months.

103. Question. Now, the question that I ask, did your going to Port Royal once in three months conflict with you duties in paying the men on the "Franklin?"

41 Answer. It did. How do you mean?

104. Question. Could you not have made all the payments necessary to have been made on the "Franklin," notwithstanding your absence quarterly at Port Royal?

Answer. I could not have made all the payments necessary on the "Franklin?"

105. Question. Why is that so?

Answer. Because I can not be in two places at once. I have just stated that payments were made constantly on the "Franklin."

106. Question. I understood you to say that the payments were made at the last of the month on the "Franklin?"

Answer. That is, one kind of payment. I have also stated that men were paid off at irregular intervals. Whenever a man is to be discharged he is paid off, and it may occur on any day in the month.

107. Question. For those purposes then you leave money with your pay clerk to meet those payments during your absence?

Answer. When I was absent; yes.

108. Question. Are those the only occasions on which you leave money with him for the purposes of payment?

Answer. Are those the only occasions?

109. Question. Yes, sir.

Answer. No.

110. Question. Were you required by the commandant at all times when you visited Port Royal to visit that place?

Answer. I never went except under orders.

111. Question. You never went except under orders?

Answer. No, sir.

112. Question. Did you feel that an order directed to you to go to Port Royal authorized you to deliver money to your pay clerk?

42 Answer. I did.

113. Question. If you were a paymaster on a ship at a foreign station and was ordered home by your Government, would you feel it your duty to turn over the funds in your possession to your pay clerk?

Answer. If I was on a ship in a foreign station, and ordered home by the Government, I would not be ordered home unless I was relieved.

114. Question. How long have you known the defendant?

Answer. I have known the defendant since November, 1892—1891—it was November, 1892. He was with me 18 months on the "Kearsarge," and then came to the "Franklin" with me.

115. Question. Since you have known him then, he has been pay clerk with you?

Answer. He has been pay clerk ever since I have been detailed to the "Franklin."

116. Question. His duties would require him to keep the accounts?

Answer. Yes.

117. Did he keep those accounts?

Answer. He did.

118. Question. Have you ever examined those accounts?

Answer. Yes.

119. Question. Were those accounts kept properly by him?

Answer. Well kept.

120. Question. When, on the 10th of October of this year, you examined the books to ascertain the shortage did you have any difficulty from the books kept by him in ascertaining——

Answer. I did not examine the books to ascertain the shortage. That was done by the inspecting officer.

43 121. Question. You did not make the examination?

Answer. I did not make the examination. I am not required to make the examination; that was the duty of the inspecting officer; he examined my books.

122. Question. What is the first intimation you had of any shortage?

Answer. The confession of Mr. Sayre.

123. Question. He voluntarily made that statement to you?

Answer. He did.

124. Question. Will you please repeat that statement?

Answer. What he made?

125. Question. Yes, sir.

Answer. He said "I am about $2,000.00 short."

126. Question. You reported the matter then to Paymaster Schenck?

Answer. Yes.

127. Question. And he made a statement in the presence of you both?
Answer. Yes, sir; that is right.
128. Question. Will you please state what that statement was?
Answer. I asked him if he admitted that I knew nothing about the shortage, and he admitted that I did not.
129. Question. Is that the only statement he made?
Answer. That is about the only statement.
130. Question. Then the first knowledge you had of the shortage was a statement made by him to you?
Answer. Yes, sir.
131. Question. Did he say about $2,000.00 short?
Answer. Yes, sir; about $2,000.00 short.
44 132. Question. And in the presence of yourself and Paymaster Schenck he stated that you knew nothing about the shortage?
Answer. He did.
133. Question. Those were the statements, you say, and the only statements he made on the subject?
Answer. The only statements made on the subject that had any special reference to it.
134. Question. Have you had occasion to examine your books since the 10th of October?
Answer. Well, I have kept them myself since the 10th of October.
135. Question. Therefore you have seen them and examined them to some extent?
Answer. Yes.
136. Question. Did you find them all correct?
Answer. I did, because I had replaced the money which was short.
137. Question. What has been the character of the defendant since he has been in your employ as pay clerk?
Answer. It has been good as far as I know. I never had any fault to find with him up to that time.
138. Question. How long have you been on the receiving ship "Franklin?"
Answer. Since last July a year ago.
139. Question. Were you frequently, during that time, ordered to Port Royal?
Answer. I was ordered down there once in 3 months.
140. Question. Always according to orders?
Answer. Always according to orders.
45 141. Question. Did you ever ask the privilege of the commandant or anyone else in authority to allow you to leave funds with your pay clerk?
Answer. No.
142. Question. To meet the bills that might be due?
Answer. No.
143. Question. Or come due during your absence?
Answer. No.
144. Question. In your visits to the monitors did you ever ask for such permission?
Answer. I never did, it was not necessary.

Redirect examination:

145. Question (by the JUDGE ADVOCATE). Did the commanding officer of the "Franklin" give orders to your pay clerk to pay these men during your absence in Port Royal or Richmond?

Answer. Did he give orders?

146. Question. Yes.

Answer. I will explain that in a general way, that whenever any payments were necessary they were paid by the pay clerk, of course.

147. Question. Never without an order from the commanding officer?

Answer. Never. Of course the routine of the ship ran during my absence the same as when I was present.

148. Question. If a man is discharged is it necessary to have an order for that discharge?

Answer. If he is discharged he would pay him.

149. Question. If a man was discharged at the expiration of his enlistment, or if he was not discharged at the expiration of his enlistment, would the Government be put to any expense in retaining that man on board ship?

46 Answer. Certainly it would.

150. Question. Then during your absence in Port Royal or Richmond if a man's enlistment expires it was necessary to pay him?

Answer. It was necessary to pay him at the time. Men who were detained over time would have to have one fourth additional pay.

151. Question. Then an order for the discharge of a man is endorsed by the commanding officer. It is equivalent to an order from the commanding officer to pay him?

Answer. Of course an order of discharge is equivalent to an order to pay him.

152. Question. Did you ever leave checks in the possession of your clerk?

Answer. Yes; on one occasion I left a check in the possession of my clerk.

153. Question. Were they signed in blank?

Answer. No; they were not wholly blank.

154. Question. Will you explain how they were?

Answer. Well, I can explain the transaction in detail. It was on my last visit to Port Royal, and I had several bills to pay, and the amount was embodied in a draft which I expected to find at Port Royal. In order not to detain these bills, the payment of these bills, I left these checks with Mr. Sayre, with instructions; then I informed him that I found that I had received the mony for him to issue these checks. The checks had all been paid and collected.

155. Question. Article 1490 states, you have said on cross-examination, that "Pay officers shall, except when prevented by an exigency

47 of the service to be determined by the commanding officer, be present and personally superintend the issue of money and the receipting therefor." Does not that regulation contemplate that the pay officer may be absent at the time on other duty?

Answer. Certainly.

155. Question. In the absence of the pay officer who would naturally pay the money?

Answer. The pay clerk.

156. Question. Who is responsible for the money?

Answer. The paymaster.

157. Question. Under bonds?

Answer. Under bonds.

158. Question. Are men paid on the "Franklin" on special money requisition?

Answer. On special requisition, and on general requisition.

159. Question. Suppose an occasion should arise during your absence on duty at Port Royal or Richmond, in the yard at a meeting of the statutory board, or even in Norfolk, or in your absence from the ship, either on duty or for pleasure, and the commanding officer signs a special requisition, would it be the duty of your clerk to pay that requisition?

Answer. It would.

160. Question. He could not pay it if he did not have the money, could he?

Answer. He could not.

48 Recross-examination:

161. Question (by Mr. HAPPER, of counsel for the accused). I would like to ask him just one other question there. During the confinement of the defendant, who has attended to the duties of your office?

Answer. I have.

162. Question. Who would attend to the duties of your office if you were ordered by the commandant to Port Royal?

Answer. Now?

163. Question. Yes, sir.

Answer. I do not know that there would be anybody to do it.

164. Question (by the COURT). Did your clerk have a separate safe for keeping the money he received from you?

Answer. Yes, sir; he had a separate safe.

165. Question (by the COURT). Did he have any access to your safe?

Answer. No, sir. I would like to add to that that I had no access to his safe.

166. Question (by the COURT). You state in your cross-examination that you had given the clerk money at other times when absent at Port Royal. What were those times?

Answer. It was necessary when I was absent at Norfolk on duty or in the yard; he had money to meet payments whenever I was absent.

By the JUDGE ADVOCATE. I would like to ask the court if this witness may retire now, and that in the morning he may read over the record of the day's proceedings and then correct his testimony.

Here the witness withdrew.

49 Pay Director CASPER SCHENCK, called as witness on the part of the prosecution, duly sworn according to law by the president of the court in the presence and hearing of the accused, testified as follows:

Direct examination:

167. Question (by the JUDGE ADVOCATE). What is your name, rank, and present duty?

Answer. Casper Schenck, pay director and general inspector of the Pay Corps.

168. Question. Do you recognize the accused; if so, as who?

Answer. I recognize him as—he has been pointed out to me as Mr. Sayre, introduced as Mr. Sayre, as paymaster's clerk on the receiving ship "Franklin."

169. Question. When did that introduction take place?

Answer. It has escaped my memory; I think it was the last inspection.

170. Question. Can you give it approximately?

Answer. I will try to give it approximately, to get something in my mind by which I can give it. It was some time early in this month; I think it was about the 9th or 10th day of the month. It was either the 9th or 10th, I won't be certain about that.

171. Question. Were you making your quarterly inspection at that time that the introduction took place on board the "Franklin?"

Answer. Yes, sir.

172. Question. Did you find that the cash on board the "Franklin" balanced with the accounts?

Answer. No, sir; I found the cash short.

Question. How much?

50 Answer. As near as I recollect at this moment it was 19—my impression is that it was $1,971.14. That is my impression as to the amount. It was 1,970 some dollars.

174. Did you have any intimation of the shortage before you made the count?

Answer. Yes, sir.

175. Question. State how it occurred.

Answer. When I went on board, while I was in the cabin, Paymaster Cann asked me to go out. When I went out he informed me that his clerk had told him that he was about $2,000 short.

By Mr. HAPPER (of counsel for accused). You need not say what Paymaster Cann told him. That is no evidence in this matter.

By JUDGE ADVOCATE. He is simply relating about it.

By Mr. HAPPER (of counsel for accused). I had no objection to it.

WITNESS (continuing). That was the first intimation I had of it. Shall I go on and tell the whole thing?

176. Question. If you please.

Answer. Well, I then went—Mr. Cann then sent for Mr. Sayre to come to his room. Mr. Cann said to Mr. Sayre, in my presence, "You are," or words to this effect; he said, "You admit or you said that you (I) knew nothing of this shortage until you told me this morning?" and Mr. Sayre said he didn't.

177. Question. He said that he didn't——

Answer. He said he didn't know anything about it, that Mr. Cann didn't know anything about it, and then I said to Mr. Sayre, "Well, had not this shortage existed before?" and this was my first inspection. I had recently been ordered to this duty and it was the first inspection I

51 had made of that ship. Before my predecessor in office was Pay Director Washington. I said before Mr. Sayre, "Didn't you know, or didn't this deficit exist when Mr. Washington made his last inspection?" He said it did partly, to my recollection, but as it was a small part of it, he got the money and made it good at the time in cash.

178. Question. Was the balance correct at that time?

Answer. At the time Pay Director Washington made his last inspection, that the cash was correct at that time? He said the deficit existed previous to that time, but he got the money.

179. Question. Was this confession by the clerk made freely, without promise of protection or hope of reward, as far as you know?

Answer. As far as I know, in all he said to me there was no promise of reward in my presence.

180. Question. Did you personally count the cash?

Answer. I did.

181. Question. And go over the accounts?

Answer. I did.

182. Question. How many times did you examine the accounts and the amount of the cash?

Answer. Well, I only counted the cash once. The first time I counted the cash, my clerk went over the vouchers. I counted the cash and then took all the receipts and expenditures, and all the excess of the receipts over the expenditures ought to have been the amount of the cash on hand. The first time I counted the cash and my clerk went over the expenditures. The second time, I having already counted the cash, I went back so as to be perfectly sure I was all right, and having already counted the cash, I did not count it again, but I went over all the expenditures and
52 receipts and all the vouchers personally, so as to be sure.

182. Question. Was there any difference in the amount?

Answer. There was a difference of 30 cents on the second day; it was accounted for by the receipt of 44 cents, or rather for a certain number of dollars and 44 cents, which, by accident, the day before had been entered as 14 cents. The clerk in copying it off before copied it as 14 cents. It looks something like 14 cents, but it was 44 cents and the consequence was that the deficit was 30 cents less on the second day than on the first.

183. Question. Does that recall to your mind now the exact amount of the shortage of the deficit?

Answer. As I said before, there was $1,971.14; I think it was the amount. It may be $1,972.14, but my impression is that the first day I found it $1,971.44. I made a report at the time, immediately that night, to the Paymaster-General in which I stated the amount, and it was 30 cents less than the amount stated in my report.

184. Question. These were public moneys that you counted?

Answer. Yes, sir.

185. Question. For the use of the Navy?

Answer. Yes.

186. Question. Is it customary for paymasters to leave cash in the possession of their clerks for disbursements?

Answer. Yes, sir; I think it is.

187. Question. Is it necessary?

Answer. I do not see how it could be well avoided.

188. Question. How long have you been in the service of the Navy?

Answer. Since 1861, and have been in the service 33 years
53 last month.

189. Question. Has that always been the custom during your service?

Answer. It has always been the custom.

Cross-examination:

190. Question (by Mr. HAPPER, of counsel for accused). You say that it was about the 9th or 10th of this month that you came down? What was the object of your visit?

Answer. My object was to make my quarterly inspection of the accounts of the pay officers attached to the navy-yards and receiving ships—such ships as were not attached to squadrons. My regular duty is to go to every station in the United States, this side of the Rocky Mountains, to inspect, once every quarter. I had not inspected this station during the current quarter and I came down to inspect it.

191. Question. Did you inspect the books and accounts of Paymaster Cann?

Answer. Yes, sir. That is, I examined the books to see if they were properly kept and in proper form. I examined all the books that were vouchers, and the pay roll and such books as were vouchers, and I casually examined the others to see that they were kept in proper form.

192. Question. Did you find that they were or were not kept properly and in proper form?

Answer. They seemed to be kept in proper form. The only fault I found in the whole thing was the deficit in cash.

193. Question. Did you have any difficulty in determining the deficit on examination of the books and vouchers of the cash?

Answer. No; no other difficulty than would ordinarily occur, because I had the labor.

54 194. Question. I understand; but you had no difficulty in arriving at the result upon the investigation?

Answer. None at all.

195. Question. Did you know of that deficit before you made the examination or after?

Answer. I knew there was a deficit before I made the examination; that is, I had been informed that there was a deficit. I did not know it so I could swear to it, but I had been informed that there was a deficit. I had been informed, as I stated in my direct testimony, by Paymaster Cann that there was a deficit.

196. Question. You had been informed by Paymaster Cann and by the defendant here?

Answer. Well, informed by the defendant; as I stated in my direct testimony, he had not informed me personally that there was a deficit, but he had stated in my presence. Mr. Cann asked him, referring to this deficit, whether he said "You say or admit" (I cannot remember the exact words that he used) "that I knew nothing about this shortage until you told me this morning," and Mr. Sayre said Mr. Cann did know nothing about it. And then the other admission was, he admitted to me personally that part of the deficit existed before the last inspection, but that he had obtained money and made it up.

197. Question. Was this last statement of the defendant made in your presence and in the presence of Paymaster Cann?

Answer. The last statement about his making up the money?

198. Question. Yes, sir.

Answer. It was made in my presence, and I am under the impression it was in Paymaster Cann's presence.

199. Question. It was a statement immediately following the first statement made to Paymaster Cann, was it?

55 Answer. No; following within an hour, perhaps. The first statement made to Paymaster Cann was not made in my presence. It was made while I was in the cabin with the captain. It is my custom when I go on board of a ship in the first place to call on the captain, and inform him that I am there for that purpose; and I call on the commanding officer of the ship. I went in to call on the commanding officer. I had reported to him that I was there for that purpose, and we had some little conversation, when some one came in—the orderly came in and said that Paymaster Cann was all ready, and would like to see me as soon as possible. I immediately went out, and it conveyed the impression to my mind that Paymaster Cann wanted to see me for some purpose. My clerk had already gone down to commence the inspection. Paymaster Cann wanted to see me. I met Paymaster Cann, and he appeared to be agitated, and he told me that his clerk had just confessed to him that he was about two thousand dollars short. Then I went below—I think I went into the office first. Mr. Sayre was in there, and Mr. Cann called Mr. Sayre into his room on the opposite side of the deck, and Mr. Sayre came in there, and then this conversation took place, and then these admissions were made. Those were the only admissions made to me, and I took no official notice of those admissions in making my inspection. I made my inspection exactly as I would have made it if there had been no admissions made.

200. Question. And you were able, from the examination you made, to discover the proper deficiency?

Answer. Yes, sir.

201. Question. Is there any deficiency now?

Answer. I do not know, sir. There was a deficiency when I

56 made my report. I have heard—but [from] what I have heard, I think that the deficiency was made up by somebody; but I do not know anything about that.

202. Question. When was your report made?

Answer. My report was made that night; that is, I reported by telegraph in the first place. I telegraphed that Paymaster Cann was about $2,000 short, and that his clerk had confessed to appropriating the money. Then I made an official report by letter to the Paymaster-General that night, which I think was the night of the 9th of October. I could not be positive as to the date, but I think it was the 9th of October that I reported to the Paymaster-General that the account, and reported the exact amount, only it was thirty cents more, because it was before I made my second inspection, and there I found this deficit of thirty cents. My first report was thirty cents more of deficit than really existed. After that I made an official statement on certain forms, such as I always do make, and in that I reported the amount just as I found it. That I made perhaps a week after.

203. Question. You do not know, I understand you to say, whether there exists in that office a deficit at this time?

Answer. I do not, only what I have heard. I know nothing about it of my actual knowledge.

204. Question. Did Paymaster Cann say anything to you about making good any deficit in the accounts?

Answer. I do not remember that he did. There was some conversation on the subject. I think I advised him to do so, but I am not even certain of that. He met me at the ferry, perhaps the next day, and
57 made some joking remark, which intended perhaps to convey to my mind that he had made the deficit good, but I did not so understand it. I understood from that remark that he would make it good, but I afterwards heard that he had made it good at the time he had made this remark to me. That I only heard. I won't say from my own knowledge.

205. Question. You have stated that it is necessary, you think, for paymasters to place money in charge of their pay clerks?

Answer. Yes; when it is necessary for a paymaster to be absent from the ship for any length of time. I said it was customary; I did not say it was necessary. I presume I said it was necessary, too. It is necessary if the business of the ship goes on that when a paymaster is necessarily absent he should place money in somebody's hands to carry on the business of the ship, and his clerk would be the most natural person to place it with.

206. Question. Is it or is it not against the regulations for a paymaster to leave money with a pay clerk?

Answer. I know of no regulation that would require that.

207. Question. I mean is it not against the regulations for a paymaster to leave money with his pay clerk?

Answer. Well, I cannot swear that it is not against the regulations. I never have seen any such regulation. It has escaped my notice.

208. Question. If it is necessary, if it becomes necessary, in the performance of his duties for a paymaster to leave money with his pay clerk, might he not get authority to leave money for that purpose?

Answer. He might, but it never has been customary to do so. I do not know. He might get authority from the Secretary of the
58 Navy to do so. It never has been customary. It has always been customary to leave money with a pay clerk.

209. Question. Article 1490 reads as follows: "The pay officer shall, except when prevented by an exigency of the service, to be determined by the commanding officer, be present and personally superintend all issues of money and the receipting therefor." In the exigencies, then, arose, could he not get permission, and would it not be his duty to get permission, from the commanding officer, whose duty it was to determine the exigency?

Answer. Well, I should think it would under that regulation. I remember the regulation now, but the regulation has been made since I was in a position where I disbursed money, and it escaped my recollection.

210. Question. You never knew the defendant until a short time ago, as you have stated?

Answer. I never saw him until I saw him on board ship.

211. Question. You have no knowledge of the existence of service on his part to the Government?

Answer. No; I never saw him until I met him on board of the ship at this place.

By Mr. WARNER (of counsel for accused). 212. Question. Is it customary to issue to officers of the Navy copies of the regulations governing the Navy?

Answer. O, yes, sir.

213. Question. Is it the custom to issue copy of such regulations to paymasters' clerks?

59 Answer. That I do not know, sir. I presume not. I do not know. It is presumption. I do not presume——

By Mr. HAPPER (of counsel for accused). 214. Question. I am not examining you as to custom.

Answer. I do not know whether it is the custom to issue to paymasters' clerks or not. It is customary to issue them to all of the officers of the Navy.

215. Question. You have never known them to be issued to paymasters' clerks, have you?

Answer. Well, I could not swear to that. My clerk had one. I do not know how he got it. My clerk has one, and I have known numerous paymasters' clerks to have them, but whether they were issued to them officially or not I do not know.

216. Question. I am not asking whether or not it is the custom.

Answer. No; I do not know. I only know it is customary to issue them to officers. I know it is the custom to issue them to pay officers, and I presume it is customary to issue them to all other officers. They issue them to pay officers, and require a receipt from them.

217. Question. How are paymasters' clerks appointed in the service?

Answer. They are nominated to the Secretary of the Navy by the paymaster, and the Secretary of the Navy appoints them.

218. Question. He is appointed, then, by the Secretary of the Navy on the recommendation of a paymaster?

Answer. Yes, sir.

219. Question. Who desires his services?

60 Answer. Yes, sir; that is, paymasters' clerks. I am under the impression that that is the way paymasters' clerks on board ships are appointed. It is the way paymasters' clerks on shore are, but I have not been at sea for a good many years, and there have been a good many changes in the regulations during that time, and while I have known them and have read them, as I have not been called upon to apply them, some of them may have escaped my memory. I know, however, that a paymaster on shore duty nominates his clerk to the Secretary of the Navy—his chief clerk—and the Secretary of the Navy appoints him.

220. Question. You have a clerk?

Answer. I have a clerk; yes, sir.

221. Question. Under whose management and control is your clerk; is he subject to your orders?

Answer. Yes, sir. My clerk is subject to my orders. He has general orders from the Secretary of the Navy to accompany me on my inspections, and, in order that the accounting officer of the Treasury in paying his expenses may know if he did accompany me on my inspection, I generally give—I always give him an order to accompany me on such and such a trip. He has general orders from the Secretary of the Navy to accompany me on all inspections.

222. Question. When you telegraphed to the Government or the head of the Department, and afterwards reported in writing, in reference to this shortage, your report was based upon the information which you had derived from Paymaster Cann and from the defendant here?

Answer. So far as——

223. Question. So far as that shortage?

Answer. No, sir; not so far as the shortage.

61 224. Question. So far as it related, then, to the defendant?

Answer. So far as it related to the—that portion of my telegram which said the clerk has confessed was based on that, but the amount of the shortage was based on my own examination.

225. Question. I understand. I had reference to the confession. The statement which you made in your reports was based on the information which you derived from him—Paymaster Cann?

Answer. Yes, sir.

226. Question. And you have already stated what that information was?

Answer. Yes, sir.

Redirect examination by the JUDGE ADVOCATE:

227. Question. When you verified the cash balance in the first inspection was any remark or comment made by the accused as to the amount?

Answer. Yes, sir. The accused, when I stated the amount—the accused said there was a mistake of thirty cents. It was thirty cents less, which I found to be the fact when I verified the account the next day. The next day I found that it was thirty cents less than I had stated. When I finished my inspection the first day I went to Paymaster Cann, and told him how much I had found deficient and the accused said that that was wrong by thirty cents. I do not know whether he used the word thirty cents, but he told me what the amount of the shortage was, and there was thirty cents less than the amount that the next day turned out to be.

228. Question. During your thirty odd years of service, in your absence from your ship, the numerous ships you have been on during that

62 time, on duty or on pleasure bent, if the captain of the ship presented an order to the pay clerk, would it be his duty to pay it?

Answer. Yes; if he had the money I presume it would be his duty.

229. Question. Are you subject to the orders of the commanding officer of the ship?

Answer. Certainly, sir.

230. Question. Is the pay clerk subject to them?

Answer. Certainly, sir.

231. Question. Then would it not be his duty to obey the order of the commanding officer?

Answer. Undoubtedly, if it were within his power to obey it.

232. Question. You have stated that it has been the custom during your long service with pay officers when absent from the ship to leave money in the possession of the pay clerks for public use—that is, for disbursement for public purposes?

Answer. Yes, sir; for disbursements for such emergencies as may arise.

233. Question. Would the disbursements be made in a case of emergency without an order of the commanding officer?

Answer. Well, I think now the regulations require that all disbursements should be made by the order of the commanding officer. In my day, when I went to sea, the direct order of the commanding officer was not required. His subsequent approval of the pay roll was considered as assuming the responsibility of the order having come from him. But at present, I believe, it is required that all money shall be paid out by order of the commanding officer.

63 Recross-examination by Mr. HAPPER, of counsel for accused:

234. Question. You have stated, in answer to the reexamination, that the defendant said there was a difference of thirty cents; he made a remark to that effect?

Answer. As I said——

235. Question. Now, I want you to say——

Answer. I afterwards stated that he either said there was a difference of thirty cents or told me what the amount was, which was a difference of thirty cents. I am not certain.

236. Question. Where was this statement made?

Answer. In the office.

237. Question. Did he have the books there at the time?

Answer. He was not looking at the books; no, sir. Well, he had the vouchers necessary to find that out, because they were lying on the desk that I was engaged in; but he had been standing there while my clerk was taking a list of the vouchers, and he may have taken a list of the vouchers at the same time.

238. Question. Then he had an opportunity of seeing the vouchers at the time he made to you the statement?

Answer. Yes, sir.

Redirect examination by the JUDGE ADVOCATE:

239. Question. At that time did he appear to be counting the vouchers in any way?

Answer. I could not say certainly about that, because while my clerk was going over the vouchers I was counting the money, and I am not certain what part Mr. Sayre took in that.

64 230. Question. How many people were present in the office at this time?

Answer. There were five. My recollection is there was Mr. Cann, my clerk, Mr. Sayre, Mr. Cann's yeoman, and myself.

231. Question. Was it possible for the clerk to have made any other confession in that office at that time without your knowledge?

Answer. I was busy at the time, and unless he addressed me personally; he was talking to the other people, and I do not know what he may have said.

232. Question. Then it was possible that the confessions he made to you may have escaped others; is that equally true?

Answer. Yes; but the confessions that he made to me——

233. Question. I am speaking of at that particular time.

Answer. The confession he made to me at this particular time? He did not make any confession to me. He stated the amount of the shortage. The confession—the only confession he made—was where he admitted that——

234. Question. That, as I understand you, occurred in the office?

Answer. Not in the office, but in Mr. Cann's room. Then nobody was present but Mr. Cann, Mr. Sayre, and myself.

235. Question. This confession made to you, as to the amount of the shortage existing in the July inspection, was not of necessity heard by others present in the office?

Answer. That confession was not made in the office.

236. Question. Where was it made?

65 Answer. That was made in Mr. Cann's room. There was nobody present but Mr. Cann. You mean the shortage in the previous inspection?

237. Question. The shortage in the previous inspection.

Answer. That was made in Mr. Cann's room, and nobody was present but Mr. Cann, Mr. Sayre, and myself.

238. Question. Will you think over that again?

Answer. Yes, sir. That was certainly my impression; that it was made in Mr. Cann's room, and nobody was present except Mr. Cann, Mr. Sayre, and myself. I am under that impression. I said afterwards to Mr. Sayre in the office, "what did you do with the money?" and he did not make any answer to that, and I am pretty sure that in the confession he made the remark as to there having been a deficit in the former inspection was made to Mr. Cann and myself in his room. That is certainly my impression.

239. Question. You are not sure whether it occurred at that time or not, whether it occurred in Paymaster Cann's room and in his presence, or in the paymaster's office and in the presence of four others?

Answer. I feel morally certain that it occurred in Mr. Cann's room. I would not be willing to swear to it. There was considerable conversation occurring in the office and made in the room. Now that you have called my attention to it, I am not absolutely certain whether it did occur there. When I made the statement I felt certain in my own mind that it occurred in Mr. Cann's room.

By the COURT:

Question. 240. If money is left with a pay clerk by pay officers,

66 is it, in your opinion, that money so left is Government money or money belonging to the pay officers—that is, is it not subject to disbursement by order of the commanding officer and by no other authority?

Answer. The question if money left by the pay officers to his clerk, whether in my opinion it is Government money or money belonging to the pay officer, I could not answer that. The pay officer might leave his own money with a pay clerk for some purpose, but if Government money is left—if it is Government money that he leaves with the pay clerk, under the present regulations it only can be disbursed on the order of the commanding officer.

By Mr. HAPPER (of counsel for accused). I think that question is rather a legal one than a question of fact.

By the COURT. He is inspector-general of the pay corps; he is an expert.

By Mr. WARNER (of counsel for accused). He is being examined as an expert.

Answer. I said if it was Government money it would be subject only to the order of the commanding officer. I would like to add that if it was left to the clerk in his official capacity for disbursement, in my opinion it would be Government money.

The foregoing testimony of Mr. Schenck was read over to him, and upon being pronounced correct by him, he withdrew.

The court then, at 3.45 o'clock p. m., adjourned until 11 o'clock a. m., October 31st, 1894.

67 SECOND DAY.

NAVY-YARD, NORFOLK, VIRGINIA,
11 *a. m., Wednesday, October* 31, 1894.

The court met pursuant to adjournment of yesterday. Present, all the members, the judge advocate, and the accused.

The judge advocate stated to the court that owing to the bad working of the type machine the stenographer would not be ready with a clean copy of yesterday's proceedings until half past 12 o'clock. The court then took a recess until 1 p. m. At 1 p. m. the court reassembled. Present, all the members, the judge advocate, the accused, and Messrs. Happer and Warner, counsel for the accused. The stenographer not present. The court waited until 2.30 p. m., at which time it adjourned until 10 a. m. to-morrow, Thursday, November 1st, 1894.

THIRD DAY.

NAVY-YARD, NORFOLK, VIRGINIA,
10 *a. m., Thursday, November* 1, 1894.

The court met pursuant to adjournment of yesterday. Present, all the members, the judge advocate, the accused, his counsel, and the stenographer.

The record of Tuesday and Wednesday was read over and approved.

Paymaster James E. Cann entered before the reading of his testimony commenced, and, after hearing it all, pronounced it correct, and withdrew.

Paymaster JAMES E. CANN, recalled as a witness on the part of the prosecution, and warned as to his oath, testified as follows:

Question (by the JUDGE ADVOCATE) 241. Had you seen Pay Director Schenck on the 10th of October last before you sent in the cabin for him?

68 Answer. I met him on deck and shook hands with him—on the gun deck.

242. Question. Where did the accused first make confession to you?

Answer. In my stateroom.

243. Question. Where did he make the confession that you knew nothing about it?

Answer. In his own stateroom.

By Mr. HAPPER (of counsel for the accused). I object to that question and answer, and ask the court to exclude it.

By the JUDGE ADVOCATE. Why?

By Mr. HAPPER (of counsel for accused). If the court wants me to state my reason for the objection I will do so. I cannot understand how a witness can testify to a confession which he knows nothing about. If he is not present he therefore can know absolutely nothing of it.

By the JUDGE ADVOCATE. May it please the court, in his direct evidence the witness has testified to the fact that the accused made a confession to him, first that he was short about $2,000; that he then, he, the witness, sent up for Pay Director Schenck to come down, and that in the presence of Pay Director Schenck and himself the witness repeated that he, Paymaster Cann, knew nothing about the shortage. That is all.

By Mr. HAPPER (of counsel for the accused). That is true. I now ask you to let the stenographer read your question and the answer to it.

The stenographer read as follows:

"Question. Where did he make the confession that you knew nothing about it?

"Answer. In his own state room."

69 By Mr. HAPPER (of counsel for the accused). I withdraw my objection.

244. Question (by the JUDGE ADVOCATE). Where did the verification of the confessions and deficit take place?

Answer. An examination was made in the pay office.

245. Question. Then there were three rooms?

Answer. Yes.

246. Question. That you were in that morning?

Answer. Yes.

247. Question. Your own room?

Answer. His stateroom.

248. The accused's stateroom?

Answer. And my office.

249. Question. Where is the stateroom of the accused; in what part of the ship?

Answer. It is on the port side. It is the first room outside of the ward room.

250. Question. Where is your office?

Answer. My office is diagonally across the ship on the starboard side.

251. Question. How long were you in the accused's room; that is, you and Pay Director Schenck?

Answer. Well, to the best of my recollection we were in there ten minutes. It would seem about a quarter of an hour. I could not give you the exact number of minutes. I made no note of it. My stay there was very short.

252. Question. You state that Pay Director Schenck was present in the accused's room, and that the accused stated to him, or in his presence, that you knew nothing about the deficit?

Answer. I did.

70 253. Question. Was there any other conversation held in that room at that time?

Answer. Yes; there was a little private conversation between Mr. Schenck and myself.

254. Question. Anything between Mr. Schenck, the accused, and yourself?

Answer. I don't know that the accused had anything to say in regard to the matter there—any conversation in addition to that of Mr. Schenck and myself.

255. Question. Did you leave Mr. Schenck alone in the room with the accused?

Answer. I cannot recall. I think I came at first out of the door and went towards my office, and then they both followed me, and whether Mr. Schenck and the accused remained behind I could not tell; I could not state.

256. Question. On October the first, when the accused gave you the receipt for the balance of $2,701.44, did you count his cash?

Answer. I did not.

257. Question. Prior to that he had a larger sum in his hands, had he not; or was this the balance left of several sums paid into his hands for Government use?

Answer. Of several sums.

258. Question. Did he render you an account of the manner in which disbursements had been made?

Answer. I will answer that question by saying that he gave me once a week a pencil memorandum of his disbursements, which I entered up on my cash book and took another receipt for the balance. I deducted the amount shown on his statement from the amount shown to be in his hands. Then he gives me a receipt for the remainder or the balance.

71 259. Question. The balance supposed to be in his hands?

Answer. Yes.

260. Question. What became of the receipts given prior to the one in question; that is, the one October first?

Answer. Well, I can answer that question. When I take his receipts for the balance I destroy the others. I had no further use for them. No; I will correct that. I hand them over to him.

261. Question. You hand them over to him?

Answer. Yes; I hand them back to him.

262. Question. By whose order is the monthly money paid to the men?

Answer. By the commanding officer.

Cross-examination by Mr. HAPPER, of counsel for the accused:

263. Question. Will you please state on what day of the month the accused made the statement to you that he was about $2,000 short?

Answer. On the 10th day of October, in the afternoon.

264. Question. Was it the same day that you made the statement to Paymaster Schenck?

Answer. The very same day.

265. Question. In the first question of cross-examination, it appears that counsel asked the duties of pay clerk, when it was the intention to ask the question as to the duties of paymaster. Will you please now state what the duties of paymaster are?

Answer. Well, in general, paymasters' duties are to assume charge of all moneys—Government moneys—and to disburse them.

266. Question. Then I understand that the principal duties of paymaster are that of receiving and disbursing officer?

Answer. Yes, sir.

267. Question. By what authority are those moneys disbursed?

72 Answer. By what authority?

268. Question. Yes, sir.

Answer. Well, the question has been pretty well answered. All money paid to men is by order of the commanding officer. When money is paid to officers, it is simply shown by the statement of their account. For instance, if you are an officer, and you had $150 due you on my books, and you came in and wanted it, I would give it to you. That requires no order.

269. Question. Have you a form of the order of the commanding officer now in your possession, upon which moneys are paid to men?

Answer. I guess; I have lots of them aboard ship.

270. Question. I mean in your possession here.

Answer. No; I have not.

271. Question. Will you please state what that form is, and how the same is addressed?

Answer. Well, it is headed "requisition;" that is, money requisition. Then there is a list of the number of men, as many as may be, and their rates and the amount of the requisition and the amount allowed by the commanding officer. That is signed by the executive officer, or, rather, that is submitted by the executive officer, signed by him, and underneath is an order to the paymaster to pay it, and it is signed by the commanding officer.

272. Question. Then I understand from your answer that the order is addressed or directed to the paymaster?

Answer. To the paymaster.

273. Question. You have stated that, quarterly, you visited Port Royal at the command or under the orders of the commandant. Were those orders issued at your request?

Answer. They were.

73 274. Question. Did you specify the time for which those orders should be issued?

Answer. The time embraced in the order?

275. Question. Yes.

Answer. No. The order read, that you will proceed in the performance of your duties, and, when completed, return.

276. Question. Did you name the particular time when you thought it was necessary, and obtain an order for that time?

Answer. I never named any particular time. I sent up to request the order. I have my regular dates for going. I sent up to request the order, and the order is taken up to the commanding officer of the ship and delivered to me.

277. Question. Then your request embraces the time of going?

Answer. It is understood when I request the order that I am going at that time.

278. Question. You have stated also that you replaced the money that was a deficit, as shown by your books and cash. Will you please state when you did so?

Answer. I have stated that that was the balance from various other amounts which had been placed in his hands.

By the JUDGE ADVOCATE. I do not think he understands your question at all.

279. Question. I will repeat the question. At what time did you make the shortage, which appeared by your books and cash, good?

Answer. On the 11th day of October; on the day that the correct amount was discovered.

280. Question. Do you know when the accused was arrested?

Answer. Well, yes. On the same day he was placed in confinement by order of the commanding officer. When I say confinement I
74 mean that he was restricted to his room.

281. Question. Your books and accounts, then, did not, on the 12th of August, show any deficit?

Answer. They did not.

282. Question. Of October?

Answer. They did not, because I deposited the amount on the afternoon of the 11th of October, and on the 12th of October my books were correct.

283. Question. In answer to question 45 you stated that Paymaster Schenck and yourself went to the captain's room and reported the matter, and the captain requested you, or directed you, to make to him a written report. Did you make such a written report?

Answer. I did.

284. Question. At what time?

Answer. That same afternoon.

285. Question. On what day of the month was that?

Answer. That was the 10th.

286. Question. Do you know by whose order the accused was arrested?

Answer. On the order of Captain Johnson. That word arrest is not the proper word. I suppose it can be applied. He was ordered to be confined to his room by order of the commanding officer.

By the JUDGE ADVOCATE. It means the same thing.

By the WITNESS. Well, the same thing.

287. Question (by Mr. HAPPER, of counsel for the accused). Do you know where he is now confined?

Answer. In the same place.

288. Question (by Mr. WARNER, of counsel for the accused). You say, paymaster, that when you were in the habit of going to Port
75 Royal and Richmond you were in the habit of leaving money with your pay clerk?

Answer. Yes, sir.

289. Question. Did you on those occasions get an order from the commanding officer authorizing you so to do?

Answer. I have already stated that.

290. Question. I know.

Answer. I never did take an order. It was not customary.

291. Question. I have here a receipt that is in evidence, which you have before seen, signed by Pay Clerk Sayre. In the body of that receipt is—I will read the receipt.

Mr. WARNER read as follows:

"Received from Jas. E. Cann, paymaster, U. S. Navy, the amount of twenty-seven hundred and one dollars and forty-four cents, to be charged against my pay account, as per margin. D. B. Sayre, pay clk., U. S. Navy."

In ink in the body of this receipt are the words "Government use." Will you kindly say whether or not that was written before or after Mr. Sayre gave you this receipt?

Answer. It was written afterwards.

292. Question. After he gave you the receipt?

Answer. After he gave me that receipt?

293. Question. By yourself?

Answer. By myself. Because that was the only form, and it is understood that when he gets money it is for Government use, and when it is submitted I put it on.

294. Question. That was put there after he gave you the receipt?

Answer. After he gave me the receipt.

295. Question. Was it put there after the 10th of October or before?

76 Answer. It was in pencil before the 10th of October and in ink afterwards.

296. Question. You put it in ink after the 10th of October?

Answer. Yes, sir.

Redirect examination:

297. Question (by the JUDGE ADVOCATE). Prior to the 10th of October were the words "Government use" on that receipt?

Answer. In pencil?

298. Question. Yes. This check reads, "Balance September 30th, $2,701.44." What do you mean by balance—balance of the pay clerk's salary?

Answer. No, sir; balance of Government funds in the hands of the pay clerk.

299. Question. This is the usual form?

Answer. The usual form that I use. There is no other form; that is, there is no form of paying and taking his receipt, and it is understood it is for Government use, because it shows that $2,701 was then charged his pay account.

300. Question. What is the amount of his pay?

Answer. He is paid $1,300 a year, if I remember correctly.

301. Question. $1,300 a year. Then this receipt does not represent two years' pay?

Answer. It does not.

302. Question (by the COURT). Will you state when the lead pencil note was made?

Answer. I could not tell you.

303. Question (by the COURT). Was it made before or after the receipt was signed?

Answer. I don't know. I put it on if I happened to have a pen-
77 cil in my hand. If I discovered it was there and I had a pen, then I put that on in ink. At the time I took the receipt I had no suspicion of any defalcation, and that was the ordinary way that I took the receipt from time to time. There was no difference between that and any other one.

304. Question (by the COURT). Was that amount ever charged in the books against the account? Was any amount that you gave when absent on duty ever charged on the books against his account?

Answer. Of course not. I will say no.

305. Question (by the COURT). No money is charged on the books against his account?

Answer. That money is the same as any other. I say when the pay clerk drew money it was charged against him the same as any other officer.

By Mr. HAPPER (of counsel for the accused). I would like to ask one more question.

By the JUDGE ADVOCATE. The counsel would like to have permission to ask one new question, and it appears to be new matter.

By the COURT. The court has no objection.

306. Question (by Mr. HAPPER of counsel for the accused). Is the pay clerk a commissioned officer?

Answer. No, sir.

307. Or an enlisted man?

Answer. He is neither. He is appointed officer.

The foregoing testimony of this witness was read over to him, and being, by him pronounced correct, he withdrew, the court admonishing him to hold no conversation about the matters he had testified to in court until the prosecution announced that they were through with him.

At 12.25 o'clock p. m. the court took a recess until half past one o'clock p. m.

78 The recess having expired, at 1.30 o'clock p. m. the court reassembled; present, all the members, the judge advocate, the accused, his counsel, and the stenographer.

Captain MORTIMER L. JOHNSON, called on the part of the prosecution, duly sworn according to law by the president of the court, in the presence and hearing of the accused, testified as follows:

308. Question (by the JUDGE ADVOCATE). What is your name and rank?

Answer. Mortimer L. Johnson; captain, of the United States Navy.

309. Question. What is your present duty?

Answer. Commanding the receiving ship "Franklin."

310. Question. How long have you been on board the "Franklin?"

Answer. Since the 17th of April last.

311. Question. Do you recognize the accused; if so, as whom?

Answer. I do; as D. B. Sayre, paymaster's clerk—pay clerk.

312. Question. Is Paymaster Cann paymaster of the "Franklin?"

Answer. He is.

313. Question. Paymaster Cann has, in addition to his duties on board the "Franklin," to visit the naval station at Port Royal and at Richmond, has he?

Answer. He has.

314. Question. Does that duty take him away from the "Franklin?"

Answer. It does at stated intervals.

315. Question. During those absences, do you know whether or not his clerk, the accused, has had money in his possession for disbursement for Government purposes?

Answer. He has.

79 316. Question. Did you give orders to the clerk to pay or meet any contingency that might arise during the absence of Paymaster Cann?

Answer. I have sent discharges, special money requisitions, and things of that nature to the pay office to be paid, with the knowledge that there was money on hand.

317. Question. Do you regard it as absolutely necessary for the proper conduct of the business of a receiving ship that, in the absence of the paymaster, the clerk should have money?

Answer. Undoubtedly.

318. Question. The clerk had this money with your knowledge; this clerk, the accused, had this money with your knowledge?

Answer. Yes.

319. Question. During the different periods of absence of Paymaster Cann from the ship on duty at Port Royal?

Answer. Yes.

320. Question. Then that met with your approval?

Answer. Certainly.

321. Question. Can you recall the date, that is the day of the month, and about the time of day, when you caused the accused to be placed under arrest?

Answer. The 10th day of October, 1894, between three and four in the afternoon.

322. Question. Had Pay Director Schenck visited the ship?

Answer. He had.

323. Question. That day?

Answer. That afternoon.

324. Question. In his capacity as general inspector of the Pay Corps?

80 Answer. Yes; he so reported to me that he desired to inspect the paymaster's accounts.

325. Question. How long had he been on board the ship before you placed the accused under arrest?

Answer. Well, perhaps an hour or an hour and a half.

326. Question. In the Navy, if an order is given to an officer to proceed from one station to another to perform any duty and no date of departure is mentioned, what period of time has that officer within which he must obey that order?

Answer. Four days.

Cross-examination:

327. Question (by Mr. HAPPER, of counsel for the accused). Captain, what is your duty in reference to the orders directed to a paymaster to pay money?

Answer. I do not understand the question.

328. Question. What are your duties in reference to the orders directed to a paymaster directing him to pay money?

Answer. I sign a written order.

329. Question. Can you state what that order is?

Answer. It depends upon the circumstances—what the character of the money to be paid by him is—sometimes for our discharge money, which is on a printed slip, which I sign, and again it may be a special money requisition for a man on board ship. There are various ways of putting it.

330. Question. I understood from the testimony of Paymaster Cann——

By the JUDGE ADVOCATE. I object to the testimony of one witness being mentioned to the other.

By Mr. HAPPER (of counsel for the accused). I know of no reason why I can not state that. I understand a certain rule exists.

81 By the JUDGE ADVOCATE. There are practically two witnesses [before] the court at the same time. It is contrary to military law for two witnesses to be before the court at the same time.

331. Question (by Mr. HAPPER, of counsel for the accused). Well, I will ask you this question, sir: Does the executive officer of the ship sign or have anything to do with an order directing the payment of money?

Answer. Never, except in the absence of the commanding officer.

332. Question. Is there any other person who signs an order authorizing the payment of money other than the commanding officer?

Answer. No other.

333. Question. Then the commanding officer's signature is not merely an approval, but is the only signature?

Answer. It is an order.

334. Question. And it is an order emanating from him?

Answer. Yes.

335. Question. Did you order the arrest of the accused?

Answer. I did.

336. Question. On what date?

Answer. On the 10th day of October.

337. Question. Will you please look at that paper and state whether or not that is your signature?

(Mr. Happer, of counsel for the accused, handed the paper to the witness, which he offered in evidence, and which is hereto appended, marked H.)

Answer. Yes.

338. Question. Is that the paper that you served on the accused?

Answer. I think it is.

82 339. Question. Is that the date on which it was delivered to him?

Answer. I think it is.

340. Question. What date is that, sir?

Answer. October 26th.

341. Question. 1894?

Answer. Yes.

342. Question. How are orders in the Navy given, verbally or in writing?

Answer. Verbally, usually.

343. Question. Did you give any orders to Paymaster Cann to deliver to his pay clerk money to meet the expenses of the ship during his absence?

Answer. Never.

344. Question. Were you ever requested by Paymaster Cann for such permission?

Answer. Never.

346. Question. You have stated that money was left with the pay clerk to meet the expenses of the ship during the absence of the paymaster. How did such knowledge come to your possession?

Answer. Through Paymaster Cann, and also by the orders I sent to the office being honored.

By Mr. HAPPER (of counsel for the accused). I have no further questions.

Redirect examination:

347. Question (by the JUDGE ADVOCATE). Captain, when monthly money requisitions are made up, who makes them up originally? In whose office are they made up?

Answer. They are made up in the executive officer's office and the pay office puts down the amount of money due the men.

83 348. Question. Does the executive officer sign that?

Answer. He does.

349. Question. On the 10th day of October you placed the accused under arrest. Did you make any report of that to the commandant of the station?

Answer. I did.

350. Question. Did you receive any communication from him in regard to your action?

Answer. I did; to keep him in close confinement.

351. Question. Did you receive any instructions from the Navy Department?

Answer. The commandant forwarded me a letter from the Navy Department, directing him, approving what had been done and directing him to use every precaution for the safety of the accused, or words to that effect.

352. Question. Did that also direct you to allow him every opportunity to consult counsel?

Answer. It did, which he had.

353. Question. How long after you placed the accused under arrest was it before you delivered to him a copy of this charge and specification which has been submitted by the accused?

Answer. Sixteen days.

354. Question. Sixteen days. Do you know whether or not there is more than one kind of arrest in military service?

Answer. I do not.

355. Question. You do not know whether the simple term military arrest confines an officer to his quarters only?

By Mr. HAPPER (of counsel for the accused). I object to that question.

By the JUDGE ADVOCATE. On what ground, sir?

84 By Mr. HAPPER (of counsel for the accused). Because the law itself will show for what a man can be arrested and how he is arrested.

By the JUDGE ADVOCATE. This is in connection with an attempt made here by the counsel to show that the accused was not put under arrest on the 10th day of October.

By Mr. HAPPER (of counsel for the accused). The witness cannot judge the law by any answer he may give to the question, and a man can only be arrested and held by virtue of the law.

By the JUDGE ADVOCATE. A man can be arrested and held by virtue of the law, and that arrest can be judged of one kind or another, and in the military service is so judged.

By Mr. WARNER (of counsel for the accused). He was arrested by virtue of the statutes here.

By the JUDGE ADVOCATE. By virtue of the statutes, and the statutes here enforce this also. This is a regulation of the Navy of the United States, and its operation is not in conflict with any statute. The pit that the counsel has fallen in here is simply their ignorance of military law; that is all, and I want to clear up that point. I will read you section 2, article 1785 of the Navy Regulations of 1893:

"When, therefore, such competent officer shall decide to have a party tried by court-martial, he will cause such charges and specifications against him to be prepared as he may consider proper, and will transmit a true copy of them, with an order for the arrest or confinement of the accused, to the proper officer, who will deliver such order to the accused, and will carry it into effect by delivering to him the copy of the charges and specifications, and, if an officer, by receiving his sword."

356. Question. Were any other proceedings had in this case; was
85 there any investigation into this matter before this court-martial met?

Answer. Not to my knowledge, except a court of inquiry.

357. Question (by the JUDGE ADVOCATE). Did you regard the accused as your prisoner or the prisoner of the Secretary of the Navy?

By Mr. HAPPER (of counsel for the accused). I except to the question and answer so far as it relates to the court of inquiry. I do not recognize the fact that there was any court of inquiry against this accused.

By the JUDGE ADVOCATE. The accused is certainly one of the parties.

By the COURT. He was on board ship.

By Mr. HAPPER (of counsel for the accused). That I say will appear from the record, and if he desires to introduce the record to show what that court of inquiry is, it is the best evidence.

By the JUDGE ADVOCATE. That record can not be introduced.

By the COURT. He asked the fact whether there was a court of inquiry.

By the JUDGE ADVOCATE. It is very simple to prove that such a court occurred.

By Mr. HAPPER (of counsel for the accused). It might be misleading to this court. The members of this court were not and could not be, as far as my understanding of the law goes, a court of inquiry. They, therefore, have no knowledge of the order ordering that court of inquiry. They have no knowledge, no official knowledge, at least, of the purposes for which that court was ordered. The question and answer, therefore, might be misleading to this court in this, that it might induce this court to believe that the Secretary of the Navy had ordered an inquiry into the conduct of this accused, when the order itself, if they desired to intro-
86 duce it will show that itself. Therefore, I say it is improper to introduce in the question and answer to this court that there was an inquiry into this matter. My idea is there was no such inquiry into this matter. If there was, the best evidence of it would be the order convening the court and the action of the court itself, because I take the ground that this court has no knowledge, certainly no official knowledge, of any court of inquiry, or the purposes for which that court of inquiry were convened.

By the JUDGE ADVOCATE. If the court has under examination a witness, and that witness were the commanding officer of the "Franklin," and is asked the question as to whether he at any time received an order for

the accused to be brought before the court of inquiry—that is the only point in this case.

By the COURT. As I understand it, if you were counsel in this case before a criminal court, it is presumable that there has been an indictment against this man by the grand jury. As we are ordered as a court-martial to try this accused here, it is presumable that there has been a court of inquiry. The court of inquiry stands in the same position as a grand jury.

By Mr. HAPPER (of counsel for the accused). That is unquestionably true in the civil courts, but I presume the members of this court know that courts of inquiry are not always convened to hear matters before bringing a man before a court-martial.

By the COURT. The regulations meet the same thing in a case of dereliction—to find out whether it is necessary to bring a man before a court martial.

By Mr. HAPPER (of counsel for the accused). That, I say, would, of course, appear in the order itself. Therefore, I think the order itself is the best evidence on that subject. There is no better rule of evid-
87 ence, or rule of law in reference to evidence at least, than that the basis of the evidence of a fact shall always be presented. The basis of the evidence as to the holding of a court of inquiry, and the purposes for which that court of inquiry were held, would be the order or a copy of the order itself.

By the JUDGE ADVOCATE. In the cross-examination the counsel has not asked that the pay accounts be produced and identified. An order delivered to the accused would naturally be delivered by the commanding officer of the ship. That order comes from the Secretary of the Navy and passes through the hands of the commandant and through the commander of the ship, and is delivered by him to the accused. He is testifying to his knowledge just as much as he has been to his knowledge of the different orders.

By the COURT. Why can not you ask the question? Has the accused left the ship during the period of confinement and if so, for what purpose?

By the JUDGE ADVOCATE. He would still be testifying to a court of inquiry and the result would be exactly the same. I can not see any ground for the objection here.

By Mr. HAPPER (of counsel for the accused). What was the suggestion?

By the COURT. My suggestion is:

358. Question. Has the accused left the "Franklin" since he was placed under arrest; and if so, for what purpose?

By the JUDGE ADVOCATE. Have you any objection to make to this question here, as emanating from me, of course?

By Mr. HAPPER (of counsel for the accused). No, I do not think I could seriously object to the question as propounded by a member of the court. I mean by that I think it is a legal question. I think, as a matter of fact, that that is a question that might be asked.

88 By the JUDGE ADVOCATE. Will you repeat that question?

The stenographer read as follows:

"Has the accused left the "Franklin" since he was placed under arrest; and if so, for what purpose?

Answer. He left it in obedience to directions from the president of the court of inquiry.

593. Question (by the JUDGE ADVOCATE). After you had reported your action to the commandant, and received his instruction, did you regard the accused as your prisoner or the prisoner of the commandant at this station?

Answer. The prisoner of the commandant at this station.

360. Question. After the commandant had reported the matter to the Secretary of the Navy, and the Secretary of the Navy had taken his action, whose prisoner was the accused?

Answer. The Navy Department's.

361. Question. When charges were preferred against the accused and a copy of the charge and specification delivered to him by you, his arrest was then changed from arrest by the commandant to arrest by the Secretary of the Navy, was it not?

Answer. Yes.

362. Question. Then he was placed under arrest on two different occasions; is that true?

Answer. He was not placed—he was not definitely placed under arrest on two different occasions. It was simply a change of the order of authority.

363. Question. Which is the same thing?

Answer. Which is the same thing.

89 The witness here stated that he desired to make an addition to his answer in regard to monthly money requisitions. Upon hearing the questions in his testimony marked 347 and 348, and his answers thereto, which were read to him by the stenographer, the witness said he desired to add the following:

His signature simply submits the paper to me as having been examined by him. No money can be paid without my order.

364. Question (by the JUDGE ADVOCATE). There is one other question I would like to ask. Do the regulations require you to post in different parts of your ship copies of the rules and regulations for the government of the Navy?

Answer. They do.

365. Question. Do they require you to read these to the crew once a month?

Answer. They do; they are read once a month.

The foregoing testimony of this witness was read over to him, and being by him pronounced correct he withdrew, the court admonishing him to hold no conversation about the matters he had testified to in court until the prosecution announced that they were through with him.

The judge advocate here announced to the court that the prosecution closed.

At 2.18 o'clock p. m. the court adjourned until to-morrow, Friday, November 2, 1894, at 10 o'clock a. m.

90 FOURTH DAY.

NAVY-YARD, NORFOLK, VA.,
10 *a. m. o'clock, Friday, Nov.* 2, 1894.

The court met pursuant to adjournment of yesterday. Present, all the members, the judge advocate, the accused, his counsel, and the stenographer.

The record of yesterday was read over and approved.

The accused stated that he did not desire to call any witnesses and the defense closed.

Mr. Happer, of counsel for the accused, then addressed the court as follows:

May it please the court, I rise to make a motion, and that motion is this: That all of the evidence introduced on the part of the United States by the judge advocate be excluded from the investigation of this case. I make that motion at this time, because I think this is the proper time at which to make it. If the court now desires me, before arguing upon the merits of this case, to present my reasons for it, I will do so; or, if they desire, I will present my reasons for it in the argument of the case upon the merits.

By the JUDGE ADVOCATE. No exception, as I understand the regulation, no protest can be made. I read from the Navy Regulations, page 468, article 1813: "The minutes of opinion and decision are made for the information of the revising authority, who should have the error or wrong, on whichever side it may be found, brought fairly under his consideration, but neither the judge advocate, the accused, nor any member of the court has any right to enter an exception or protest on the record."

The court has expressed its opinion as to the evidence by accepting it already.

91 By the COURT. The exception is overruled.

By Mr. HAPPER (of counsel for the accused). If the court will allow me, I will state that this is the only time that a motion in the nature of which I now make could have been made. It developed upon the hearing of the testimony in this case. It was not a ground going to the jurisdiction of this court; it was not a question going to the insufficiency of the charge and specification. It therefore did not appear on the face of the charge and the specification. But it was necessarily developed in the evidence itself, and it is the only time at which a motion such as I have now made could possibly be made in any court, whether it is a civil or a court martial—a military court.

I desire and hope to express the reasons for the motion which I make, before the court overrules the motion, and I should be glad for them to hear what I have to say on that subject, and to ascertain whether or not the motion is based upon the law by which this court is governed. If it is not the law of the case, and by which this court is governed, unquestionably this court will overrule my motion. But if it is the law of this case, governing this court, then the court will have, I think, to sustain the motion which I make.

I say it is the only time at which this motion could possibly have been made.

By the JUDGE ADVOCATE. If the counsel wishes this to go in his argument, I have no objection at all.

By the COURT. To go as an exception in his argument.

By the JUDGE ADVOCATE. It is a motion; it is an exception;
92 you may call it a motion if you like, it is an exception to the action the court has already had. Mr. Happer could have made an objection and requested that the entire evidence given by the two witnesses for the prosecution be excluded after he had heard that evidence. It is done frequently. If he had any desire to discredit a witness, any or all of them, he could have laid his plan for that when the witnesses were called and introduced.

By the COURT. His case is just as strong if he makes the argument about the motion.

By the JUDGE ADVOCATE. That is exactly it. I have not the slightest objection to his putting that in his argument. I say that at this time I cannot see that it comes in. I do not want this record to be set aside from any error of mine.

By the COURT. But he has stated the object that he wishes to accomplish.

By the JUDGE ADVOCATE. Undoubtedly. I am perfectly willing for it to go in in that way.

By the COURT. You are leaving out the question of the motion.

By the JUDGE ADVOCATE. But the question of the motion is what he wishes to get in at this time before proceeding with the argument.

By the COURT. As I understand it, according to the judge advocate's statement, he wishes to make an argument to the court before going on with the argument for the defense.

By Mr. HAPPER (of counsel for the accused). I am perfectly willing to argue the question upon its merits, or to argue it now; but I want to say that this motion which I make does not reflect upon the judge advocate or upon his procedure in this case; that it is in reference to a matter over which he had no control—it is in reference to a metter over
93 which this court had no control. It does not reflect upon the witnesses in this case, but it is a question purely of law, whether, if everything that has been said is true, and I have no doubt that everything that has been said is true, whether or not, then, it should be considered by this court at all; whether there is any case here against the accused, and whether this court should consider a single line of the evidence. I say, for the benefit of the court, that this motion could not have been made at an earlier stage of this case than it has been made. I had no right to object to the testimony of Paymaster Cann; I had no right to object to the testimony of Pay Director Schenck; I had no right to object to the evidence of Captain Johnson of the United States ship "Franklin," but I say that it has developed in this case that, under the law by which this court is governed, every particle of this testimony, admitting its truth, should be excluded from your consideration. Now, I say if that is the law of the land which creates this court, and which makes its procedure by which it is governed, then you must sustain my motion. If it is not the law, and you are not governed by it, then unquestionably you will overrule my motion; but if I have a right, as counsel, to argue this case for the accused I have a right to present unquestionably the law which creates and governs this court. It is immaterial to me at what period of the case I argue the question. I make the motion now because it is proper, in my judgment, at this point to make the motion.

By the COURT. What is the difference between making the motion and making your argument, in which the motion can be stated?

By Mr. HAPPER (of counsel for defense). None whatever.

By the JUDGE ADVOCATE. That is all I want.

By the COURT. No; you can go on with your argument.

94 By Mr. HAPPER (of counsel for the accused). I understand I am arguing the ground of this motion, and then after you have heard the argument on this motion, you will say whether or not you overrule the motion.

By the COURT. You may make it all together.

By the JUDGE ADVOCATE. That is exactly it, sir.

Argument for the defense by Mr. Warner, of counsel for the accused.

May it please the court, Mr. Happer being the leading counsel in this case, the laboring oar has necessarily been left to him. As the ground to be covered would be the same in the argument by himself or by myself, I will only take up a very few minutes of your time, and ask to be allowed now to express my thanks for the kindly consideration that we have received as counsel at the hands of this court, and it is with very great satisfaction that we appear before a court at once necessarily honorable and intelligent, men of education and fairness, who can and will obey the precept of the Navy Department, which is that this accused be tried according to the law and the evidence.

The short argument that I shall submit in this case will be upon one point, which, from my point of view, is the most vital to this case.

The defendant is specifically charged in the specification with the crime of embezzlement. Your duty is to decide whether or not such offence has been proved, and in reaching your decision you are to be guided solely by the evidence adduced before you, according to the rules of law applicable thereto, and if it be shown by the evidence that the

95 offence charged is of a different nature from that of embezzlement it is your duty to acquit.

The "charge and specification of a charge preferred by the Secretary of the Navy against David B. Sayre, a pay clerk in the United States Navy, charge embezzlement, in violation of article 14 of the articles for the government of the Navy. Specifiation: In that the said David B. Sayre, a pay clerk in the United States Navy, attached to and serving as such on board the United States receiving ship 'Franklin' at the navy-yard, Norfolk, Virginia, having, on various dates between July fifteenth, eighteen hundred and ninety-three, and October tenth, eighteen hundred and ninety-four, been entrusted by Paymaster James E. Cann, United States Navy, the paymaster of said vessel, with sums of money belonging to the United States in various amounts, furnished and intended for the naval service thereof for disbursement for the purposes of said service during the temporary absence of said Paymaster Cann from the vessel, and having on the first day of October, eighteen hundred and ninety-four, receipted to the said Paymaster Cann for money so entrusted to his care, as aforesaid, in the sum of two thousand seven hundred and one dollars and forty-four cents, did, between the said fifteenth day of July, eighteen hundred and ninety-three, and tenth day of October, eighteen hundred

and ninety-four, knowingly and wilfully misappropriate and apply to his own use and benefit, from the money so entrusted to him at various times, as aforesaid, the sum of nineteen hundred and seventy-one dollars and eleven cents, or thereabouts, lawful money of the United States; this in violation of article fourteen of the articles for the government of the Navy."

Each and every charge in this specification is to be proven upon
96 the evidence, and proven beyond a reasonable doubt, and if from the evidence and the law arising thereupon there is any doubt at all, or what is known as a reasonable doubt, it is your duty to resolve that doubt in favor of the accused.

To sustain the charge as laid in the specifications, it is necessary to prove, first, that the property entrusted to the care of this defendant was the property of the United States Government; second, that the moneys were lawfully in the possession of the accused by virtue of his occupation and employment; that it was fraudulently converted, by the accused, to his own use, in violation of a trust reposed in him. Every constituent offence must be proven to sustain the charge, and I ask you here, has any such constituent offence of embezzlement been proven? Emphatically, no. Article 1490 of the Laws and Regulations of the Navy absolutely precludes any such inference. In the crime of embezzlement it is absolutely necessary—absolutely—that the property charged as being embezzled shall have been in the lawful custody of the accused. The one and only manner in which the accused could have been in lawful possession of moneys of the United States would have been the reception by him of the funds from Paymaster Cann, acting under the expressed order of the commanding officer of the ship, provided by article 1490 of the Regulations, and in no other way.

I will read now from the case of the United States versus Harper, volume 33, of the Federal Reporter.

The crime of embezzlement is purely a statutory offence, arising under the statutes of the different States and under the statutes of the United States. The statutes vary. As this crime arises under the statutes of the United States, I cite from a case arising under the statutes of the
97 United States, the case of the United States against Harper. The opinion was rendered by Justice Jackson, then a judge of the circuit court for the southern district of Ohio, now an associate justice of the Supreme Court of the United States. In defining the crime of embezzlement, he says:

"The term embezzle, as used in this count of the indictment, and in the statute, is a word having a technical meaning, which the court will endeavor to explain here, so that you may the better determine whether the proof before you brings the defendant's act or acts within the scope of that meaning. The crime of embezzlement is a species of larceny. It is especially applicable to the unlawful conversion of property by clerks, agents, and servants, acting in fiduciary or trust capacities, and, under the statute above quoted, by a president, director, cashier, teller, clerk, or agent of any national banking association. It involves two general ingredients or elements—first, a breach of trust of duty in respect to the moneys, properties, and effects in the party's possession, belonging to another; and secondly, the wrongful appropriation thereof to his own use. In order to

constitute the crime, it is necessary that the property, money, or effects embezzled should have previously come lawfully into the hands, possession, or custody of the party charged with such offence; and that, while so in his possession and custody, held for the use and benefit of the real owner, he wrongfully converted the same to his own use. In other words, there must be an actual and lawful possession or custody of the property of another, by virtue of some trust, duty, agency, or employment, committed to the party charged; and while so lawfully in the possession and custody of such property, the person must unlawfully and wrongfully convert the same to his own use, in order to
98 commit the crime of embezzlement. The difference between the crime of embezzlement and that of larceny may serve to better illustrate what is required to constitute the former offence. In larceny there is the ingredient of an unlawful taking from the possession of the owner, with the intent to deprive him of his property, and to wrongfully appropriate the same to the use of the party so taking. The custody or actual possession in larceny is acquired by the party unlawfully, in the act of feloniously taking the owner's property without his consent. But in embezzlement there is no wrongful or unlawful acquisition of the custody or possession of the property embezzled; on the contrary, the party embezzling must be lawfully in possession, by virtue of some employment, trust, or agency, under and with the consent of the owner."

In these specifications it is alleged that the owner of this money was the United States Government. It is shown by the evidence that the accused was in possession of this money without the consent of the United States Government and in contravention to article 1490 of the Regulations of the Navy. It must be shown that he had the consent of the Government to the possession and custody of this property; it is absolutely necessary to sustain the charge of embezzlement. It has been shown by every witness who appeared on the stand here that he had in his possession the custody of this money, but the law of the land shows, according to that evidence, that he had it not with the consent of the Government, because that consent could be obtained only in one way, and that way prescribed by law.

By the JUDGE ADVOCATE. May I interrupt you one moment?

By Mr. WARNER (of counsel for the accused). Certainly.

By the JUDGE ADVOCATE. In the case of Harper, to which you
99 refer, he was sergeant of marines?

By Mr. WARNER (of counsel for the accused). No, sir; he was president of a national bank.

A few practical illustrations may serve better to explain the offence of embezzlement. If a clerk in your store, within the line of your employment, sells your goods to a customer, and receives a price therefor, and while holding the money thus received, while on his way to deposit it in the cash drawer, he converts it to his own use, or any portion thereof, this would constitute embezzlement. He has that money in his possession, with the consent of the owner, in the line of his employment. Now, if, after having received the money from a customer, the clerk should deliver it over to his employer or cashier authorized to receive it for him, and should thereafter secretely take the same identical money from the employer's pocket, or take it from the cashier's drawer, with the intent to appropriate it to his own use, that would be larceny.

By the COURT. May I ask you a question?

By Mr. WARNER (of counsel for the accused). Certainly.

By the COURT. Is not the authority of the clerk to have that money which he had received one purely incidental to the character of the duty, rather than from a specific authority given?

By Mr. WARNER (of counsel for the accused). No, sir.

By the COURT. Is it not?

By Mr. WARNER (of counsel for the accused). No, sir; the Government for the regulation of the Navy——

By the COURT. No; I am speaking of a clerk in a dry goods store; should he receive money from a purchaser isn't it in virtue of the general authority which comes to him from his position as clerk, rather than from any particular authority, specific authority, which was given him by the employer?

100 By Mr. WARNER (of counsel for the accused). It comes to him by virtue of the employment and the trust reposed in him by his employer.

By the COURT. But no specific authority need be given in any one case?

By Mr. WARNER (of counsel for the accused). Yes, sir; but if the proprietor of that store had made regulations for the government, for the conduct of clerks in that store, and one of the regulations said that the clerk will not take the money from a customer, but he should call a cash boy, who would come and take it from the customer, and he did take it contrary to those regulations, it would be larceny, and it then comes into his possession without the consent of the owner.

By the COURT. It has not been shown that it was contrary to the position of the clerk to disburse the money given him by the paymaster.

By Mr. WARNER (of counsel for the accused). That was not the point, sir. The point that I argued was that the money was not lawfully in the possession . It has no bearing upon what the clerk did with the money. It was whether or not his possession was lawful, and the lawful possession is necessary to the offence of embezzlement.

(Reading:) "It must appear from the evidence that the moneys alleged to have been embezzled were, previous to their wrong appropriation, lawfully in the possession and custody of the defendant, and that they were, while so held by him, wrongfully converted to his own use."

That is all that is necessary to read from that. Now, I will

101 explain my position on that. If, when Paymaster Cann found that it was necessary for him to be absent from the ship, and he had shown to the commanding officer that the exigencies of the service required that money should be left with the defendant, and the commanding officer had deemed the exigency to exist, and had ordered that the money be left with the defendant, then money so left in pursuance of such order would have been lawfully in the possession of the accused. The law provides one way, and one way only, in which money can be lawfully left with a clerk by a paymaster. Money so left would therefore have been subject to embezzlement, and, in the nature of things, and under the statutes of the United States and the regulations for the government of the Navy, in no other possible way could moneys of the United States have been left in the possession of the accused.

Paymaster Schenck has been examined here as an expert witness to show that it was and is a custom among paymasters to leave with their clerks moneys and so forth, but there is no evidence to show that paymasters generally were in the custom of leaving moneys with clerks. Mr. Cann testified that he was in the habit of doing it, and Pay Inspector Schenck testified that he had done it, but there is no evidence to show that it was customary generally for paymasters to do it, which was very necessary, and under no circumstances can acts unlawful, and when I use the word "unlawful" I mean that this article 1492 had not been regarded strictly according to the law. I mean no reflection; I use the word in its widest sense. I mean no reflection upon any paymaster in the Navy, because it is my pleasure to know a great many of them, and I have the very highest regard for them.

102 I will go on to say that no custom can be shown that paymasters leave money with their clerks without first having obtained the necessary order from the commanding officer, and under no circumstances can acts unlawful have the force of a custom. Will this court go so far as to say that the custom among paymasters to conduct the affairs of their offices in a manner an infraction of the regulations of the government of the Navy? When I say infraction I mean no reflection. That the custom was shown can in no way modify the regulations, which have the force of acts of Congress. I cite the Revised Statutes, 1547. To so hold would in effect be to say that the custom among paymasters would make void the regulation and abrogate the statutes of the United States.

As I said before, to my mind, the question as to the lawful custody of these funds was the vital question in this case, and I claim that from the evidence adduced here before you it has been shown that this money was lawfully in the possession of the accused.

As I stated before, Mr. Happer being the leading counsel in this case, I shall leave the laboring oar to him.

I again thank you for your kindness.

Mr. Happer, of counsel for the accused, then addressed the court as follows:

May it please the court, I come to the argument of this case with that degree of confidence which impels me to believe that a full investigation of this case must result in the acquittal of the accused. While I am an attorney, and while I am deeply interested in my client, who is also my friend, I hope that my statement of the law and of the facts of this case will be such as at least to induce you to believe in the sincerity of the positions which I shall assume.

103 The first question which I desire to call to the attention of this court is in reference to the motion which I made, asking that the evidence which has been introduced be excluded from your consideration. If the law of this case requires you to exclude it, and you do exclude it as you must exclude it if the law of this case requires it, then there is nothing upon which to base a conviction, and the prisoner, the accused, must be acquitted.

From the evidence which has been introduced it appears, without contradiction, that this accused was arrested on the tenth day of October, last month. It further appears from the evidence in this case, uncontradicted, that Paymaster Schenck informed the Department by telegram on the

evening of the day that this arrest was made. It further appears from the evidence in this case, uncontradicted, that the charge and specification was not served upon the accused until the twenty-sixth day of October, sixteen days after he had been arrested. Now, conceding for the purposes of this argument, at present (because we shall take occasion to notice the further question whether this was an arrest or not), but conceding for the purposes of this argument at this stage that the accused was arrested on the tenth, he was restrained of his liberty on that day; he was held in confinement on that day; he was confined to his room on that day, so says the captain of the ship who ordered his arrest. The Government, or the officials in Washington, said the Paymaster-General was notified of the shortage on the evening of the 10th. The charge and the specification was served on the accused on the twenty-sixth, sixteen days after this arrest had taken place. Now what says the law on the subject? I find, in the first place, in the regulations relied upon and quoted by the judge advocate:

104 "When, therefore, such competent officer shall decide to have a party tried by court-martial, he shall cause such charges and specifications against him to be prepared as he may consider proper, and transmit a true copy of them, with an order for the arrest or confinement of the accused, to the proper officer, who will deliver such order to the accused, and will carry it into effect by delivering to him a copy of the charges and specifications, and, if an officer, by receiving his sword."

Thus we find that by the Regulations of the Navy, by the rules and naval regulations themselves, in there prescribed as a guidance to commanding officers when it becomes necessary to try a person, whether an officer or whether an enlisted man, by court-martial, he shall prefer charges and specifications, put them in the hands of a proper officer for execution, and the officer, with that charge and that specification in his hand, goes to the accused and then arrests him in accordance with that order. And why is this regulation so? It is in accordance with the statutes, the law of the United States, fully set forth in article 44, at page 283, of the Revised Statutes of the United States. And what does that article say?

"The person accused shall be furnished with a true copy of the charges and the specifications at the time he is put under arrest, and no other charges than those so furnished shall be urged against him at the trial, unless it shall appear to the court that intelligence of such other charge had not reached the officer ordering the court when the accused was put under arrest or that some witness material to the support of such charge was at that time absent and can not be produced at the trial, in which case reasonable time shall be given to the accused to make his defence against such new charge."

105 It therein prescribes that the charge and the specification shall be served upon him at the time of his arrest, and no new charge or specification shall be heard by a court unless it appeared and it must appear affirmatively then in the case of a new charge, unless it appeared that the officer making the charge did not have the information upon which the charge was made or the absence of witnesses required it.

Now, this is no technical question upon which we stand. It is the foundation stone of personal liberty. It is the prescribed law of the highest law making power of your Government. It is the act of the Congress of

the United States, approved by the commander in chief of the armies nad navies of the United States, the President, by virtue of his office. It is the law following immediately after the law which perscribes for the orgauization of courts-martial in the naval service, and it is a fundamental law set forth to you; it has to be the guide as to the procedure which yon shall follow, and when you look at the regulations of your Navy, you will see that it is set forth because it is declared to be the law by the Congress of the United States. But the judge advocate, if I understand him, says, or, if it please the court, tries to say, that there are different kinds of arrest. He undertakes, by the testimony of Captain Johnson, to show that when he reports to the commandant of the station that there is a different arrest. In other words, he is producing to this court, for the purpose of answering this law by which you are guided, and by which you are here sitting, it is he who is put in the position of presenting to you a technical question in reference to the word "arrest." What does the word "arrest" mean? It means to stop, to impede, to obstruct, to seize. In
106 other words, it means any act, in so far as the arrest of a prisoner is concerned, any act which, however slightly, deprives him of the freedom which he is entitled to by nature. But whether this be true or not as a definition of it, we are not left to a definition of this word to ascertain what is the meaning of the word "arrest." There are courts-martial established for the naval service; there are courts-martial established for the army service; there are rules and regulations passed by Congress; articles passed by Congress regulating naval courts-martial; there are rules and regulations passed by Congress regulating military courts-martial. Now, what has Congress said on that subject in reference to military courts-martial? I call the court's attention to article 71, page 237, for the purpose of showing what is the meaning of the word "arrest," to page 237, of the Regulations and Articles for the Government of the Army. Article 71 says:

"When an officer is put under arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessity of the service prevents such trial, and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served on the arrested officer, or the arrested officer be not brought to trial as herein required, the arrest shall cease; but officers released from arrest under the provisions of this article may be tried whenever the exigency of the service shall permit, within twelve months after such release from arrest."

107 Now, why do I refer to this section 71? I refer to it to show that Congress has recognized that in the Army service a man is arrested when he is put in confinement, or when he is restricted of his liberty, and that the charges and the specifications may be served upon him after his arrest. I understand the claim here to be that a man is not arrested until the charges and the specifications are preferred. I say that a man is arrested just so soon as his liberty is interfered with, just so soon as he is stopped and prevented from exercising his natural liberty, and the distinction drawn between article 71, which governs the courts in reference to trials in the military service, is different from that which is set forth in

article 43, which prescribes the rule in the naval service. Why Congress should have made this distinction I do not know, nor do I care. It is enough for me, as here representing the accused, to say to you that the Congress of the United States has said that in a naval court-martial they shall hear no charge and no specifications against the accused unless it appears to the court that the charge and the specification was served upon him at the time of his arrest.

Now, I say this is the fundamental law by which you are governed. The same law created this court, and the same law has the right to prescribe the procedure of this court. And it is a fundamental, I say, safeguard of personal liberty. No man in civil life can be arrested except upon the warrant of a justice and proper magistrate or a judge. He is arrested upon a warrant; he is taken to a proper officer; his case is investigated; he may be detained for the grand jury or he may be discharged, but in the inception of his arrest he is served by the law of England, under which we have lived, and by the law of this country; he is in the first instance served with a warrant charging him with the offence
108 for which he is to be put on trial; and it seemed to have been in the mind of our law makers that such should have been the case in the naval service of these United States.

Now, I say, gentlemen, if it please the court, I say that this is no technical question. I am not asking for the release of the accused upon a technical question. I am asking it upon the truths which are laid down in the law of this land by which you are governed; and I ask you to seriously consider that section, and, when you come to consider the word "arrest," to seriously consider what Congress has said is the meaning of arrest in reference to army regulations as distinguished from navy regulations.

The next question, which is upon the merits of the case and which has, to some extent, been presented to you by my associate, is whether or not the accused is guilty of the offence for which he stands charged. He is charged under an act of Congress, and found at page 279 of the Revised Statutes, which reads as follows:

"Who steals, embezzles, knowingly and wilfully misappropriates, applies to his own use or benefit, or wrongfully and knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence, stores, money or other property of the United States, furnished or intended for the military or naval service thereof."

You see by that very enactment of Congress that there is a distinction between larceny or stealing and embezzlement. If there was no distinction between embezzlement and larceny, it would have been unnecessary for Congress to have provided for stealing, for embezzlement, and for other offences. But the distinction is as broad, is as clear, as it would be if this man was charged with embezzlement and they would undertake to prove against him house-burning. No man would perhaps say that if a
109 charge against the accused was that of embezzlement that that charge could be sustained by a proof of house-burning, and for the same reason I say to you that the charge being embezzlement, if it is not so according to the principles of law that the accused is guility of embezzlement, then you must find him not guilty, notwithstanding the fact that you may believe that he appropriated to his own use the money which is alleged to have been appropriated.

Now, there is military authority, as well as civil authority, for the position which I take, and I desire to call your attention to naval authority. There is naval authority for this position which I take, which clearly draws the distinction between larceny and embezzlement, and it is in the Bogart case, to which the judge advocate on the first day, I think, of the sitting of this court called the court's attention. This case was submitted to Secretary Robeson. The charge against the accused in that case was stealing money of the United States. It was the charge of larceny. When the Secretary of the United States [Navy] came to pass upon the question he says this—it will be found in General Orders and Circulars of the Navy Department, at page 90:

"Unfortunately, however, the evidence in the case fails utterly to establish the offence charged, which is theft. It tends to prove the other and quite distinct offence of embezzlement. Upon that proof the conviction was wrong, because illegal. The offences of theft and embezzlement are quite distinct in law, and the act of Congress above referred to enumerates them separately as different offences, and to hold Bogart guilty of theft because found guilty of embezzlement would be to disregard the general rules of law established for the furtherance of justice and binding upon all courts and revising authorities."

110 That is what George M. Robeson, Secretary of the Navy, said on October 28, 1869, in the case of Bogart, under the very statute that the accused is here being tried. That they are separate and distinct offences, made so by law, is not a technical question. It is, therefore, not a technical defence that we are making, but it is a right which we have under the law, which is guaranteed to us under the law, and which is recognized by the highest naval authority, the Secretary of the Navy of the United States himself.

Now, the question is, is the accused guilty of embezzlement, and what is the distinction between larceny and embezzlement, or, in other words, what is embezzlement? At common law, which is a law which governs every State in this Union, except so far as it is changed by statute, embezzlement was not a criminal offence. The appropriation of moneys committed to one's own use by those to whom those moneys had been entrusted was not guilty of any offence, but larceny has always been a criminal offence, for which a person who was guilty thereof should be tried and convicted. Larceny was the fraudulent, the felonious taking of the personal goods of some intrinsic value of another, with the intent to deprive the owner thereof permanently. Therefore in larceny there must have been a taking, and consequently where there was no taking, there could be no punishment under the law of larceny; but taking, even under the law of larceny, was of two kinds. Larceny does not necessarily mean that there shall be an actual taking, there can also be a constructive taking, so that, if a taking was actual or constructive taking, it was larceny. Hence the statute found it was necessary to make a new law governing or punishing parties who were not guilty of the actual or constructive taking of property, but who appropriated it to their own use after it had been delivered to

111 them. Larceny, therefore, necessarily means that the taking must be unlawful. If a man takes a thing from you, in order to be guilty of larceny it must be an unlawful taking. Hence it was that when it came to the question of embezzlement, if a man got possession of the

thing unlawfully, he was still guilty of larceny, and in order to be guilty of embezzlement he must receive it lawfully. So the court can see the distinction. Larceny meant an unlawful taking, and wherever the taking was unlawful it was a larceny, and it is so to-day. In every State in this Union it is so, in the courts of the United States it is so, as has been pointed out to you in the United States court decision by my friend who read to you from that case. To constitute, then, embezzlement, the taking must be lawful, but the appropriation must be unlawful. There must, therefore, to constitute the offence of embezzlement, there must be a possession of the property. The party can not appropriate it unless he has the possession of it; it must be a lawful possession of the property. Now, for the purpose of meeting the constructive taking, it must be a possession in the line of his duties; it must be a possession, not a bare possession, but it must be a possession in a fiduciary relation; it must be in the line of his business, and if not in the line of his business it can not constitute embezzlement, and when it is his possession in this manner, and he fraudulently appropriates it, then he is guilty of embezzlement.

Now, I start out in the first instance, I say there was never a possession in this accused. I do not mean that he did not have the actual money in his possession, but he had only the actual possession, and the paymaster had the constructive possession. If that is so, then his offence was larceny and not embezzlement. You might as well say that if a pay-
112 master goes to the bank in which he deposits his money and draws therefrom one hundred dollars, money of the United States, and gives that to me on the street in payment of a debt or for some other purpose, that I am guilty of appropriating it to my own use. He had no right, understand me, to give to this clerk a greater right to that money than he possessed himself. He was ordered by the Government, or in the sphere of his duties he received this money as a receiver, and he disbursed this money as a Government officer, and if he deposited any money in that clerk's hands for a particular purpose and that clerk disposed of it other than for that purpose, that clerk is guilty of theft under the act of Congress, and not of embezzlement, because it was the actual possession which he had, while the constructive possession was in the paymaster. Why we all know, *we all know*, and it can be illustrated. If you call your porter and give him your trunk to carry down to the depot and he disposes of that trunk to his own use, he is not guilty of embezzlement. He would be arrested, tried, and convicted for larceny, because he has the bare possession of the property, not as fiduciary, not as trustee, not as a bank officer who receives funds, not in the full scope of his trade, but virtually a possession for the purpose of assisting as an assistant to one who is charged by the Government with the care and the preservation, the receiving and the disbursing of this fund. If you give me $10,000 to hold for you, and I turn around to my friend and ask him to take charge of it for me, you have given it to me for a certain purpose and he disposes of it, unquestionably, in my judgment, he would only be tried and convicted of larceny.

Now, I say that not only should there be a possession, but that there must be a possession in the line of his duties. I call upon the
113 judge advocate, and I call to the attention of this court to search, to search in vain, to search if they can, and they will search in vain, for

any law of Congress, for any rule of the Department, which gives to a paymaster's clerk the right to receive and disburse Government funds. It is not a question, if you please, whether he did receive and did disburse. A hundred paymasters, nay every paymaster in the service, may entrust his clerk, like he would his friend, with money. That does not alter the question. He might be willing to trust his friend with his moneys, but it does not alter the question. Is there anything in the law of Congress, or is there anything in the rules and regulations for the government of the Navy, which makes his duties in any degree, in the slightest degree, the receiver and disburser of moneys of the United States? There is no such law. On the contrary, we show you a law which we say is a positive prohibition. I have said that I am not fighting this case upon technicalities, but I feel and think that we have forced our able and ingenious judge advocate here to maintain this case upon technicalities. What has he seen necessary to do? Why he goes to the captain of the ship and says, Captain, is it necessary for this paymaster to go to this point? Does not the exigency of the service require these things? He asks the paymaster, Paymaster Cann and Paymaster Schenck, if these things are not necessary. They say yes. My answer to that is this, that the Navy Department saw that it would be necessary; the Navy Department saw that the exigencies of the service at times would require it, and they have provided in the very law which prohibits it that, when the exigencies of the service require it, that question must be determined by the commander.

Now, I do not deny that there are circumstances under which a pay clerk might be convicted of embezzlement, but under what
114 circumstances? If it becomes necessary for a paymaster to leave the ship, and to be gone from the ship a month, and the exigencies of the service required that funds should be left with some one to pay out money on this ship, I say it was his duty, or it would be his duty, to go to the commander of that ship and get permission to leave funds to cover the necessary expenditures during his absence, and if that permission was given and those moneys were placed in the hands of the paymaster's clerk, and he accepted them—understand I claim further that the paymaster's clerk is not bound to accept them—but if he accepted them, then he is recognized for that particular purpose as the receiver and disburser of United States funds. Then he might probably be convicted of embezzlement; but I say there is nothing in his office—was it ever intended by the Government of the United States that paymasters should delegate their authority? I have read to this court the high authority of Secretary Welles on that subject.

"Paymasters may not delegate any part of their responsibility to their subordinates. Government property, drawn upon the requisition of a paymaster, stands charged to him, and he is held to answer for any loss occurring through his negligence or that of his subordinates."

That is found in general orders and circulars at page 51.

In the case of Rufus C. Spalding, the decision was by Gideon Welles, Secretary of the Navy.

The Government appoints a paymaster. It is a most responsible position. He is the receiver and disburser of the funds of the United States. The Government takes from him a bond for the faithful performance of

his duties. Can it be possible, I ask this court, can it be possible
115 that the law ever intended that a paymaster should delegate to a person not a commissioned officer in the service, not even an enlisted man in the service, without security of any kind, could it be intended that the Government ever proposed to allow that that paymaster should delegate that authority, except so far, perhaps, as recognized by the rules for the regulation of the Navy, where the exigencies of the service [require it], and then he gets special authority. I say to this court, without the fear of successful contradiction, that if witness Cann had gotten permission of the commander of his ship to have left the money he did leave with his pay clerk, and the pay clerk had appropriated it to his own use, that he would not have been responsible to this Government, and that he could not have been made to make it good; provided the Secretary of the Navy had a right to make any such rule or regulation, which I presume he did have a right to do.

Now, may it please the court, this is our case. We claim that there is no embezzlement here. I am sincere in the position which I take. I believe I am warranted in taking that position under the law.

We have read to you from the Federal Reporter, which fully sustains the position which I take, that there must be a possession; that it must be lawful possession; that it must be a possession in a fiduciary relation. I refer you also to the judge advocate's authority, the military law to which he referred, as to the definition of embezzlement. I refer you to the decision of Secretary Robeson that there is a distinction at law, well defined, that it must be in a fiduciary relation.

The only question for you, I say, as a court to determine is, is there anything in the law of this Government, has the judge advocate fur-
116 nished or brought to your attention any law of this Government, whether it be from Congress or from the Department, which authorized Paymaster Cann to put his funds in the hands of his clerk; or has anything been shown to you by the law of this Government or by the rules of the Department that pay clerks have any duties in reference to receiving and disbursing funds? It is not an answer to the question that they do so. When you look to a man's authority, you do not look to see whether he does the thing or not. You see a man has done a thing, but you want to know what is your authority for doing it. Was there any authority for him to receive and disburse funds of the Government? If there was not, then he could not have received this in the line of his duties. I call the attention of the court to the eminent authorities, which I shall not take up the time to read. I say that they bear out, to the fullest extent, what I have said to this court, and I desire to merely refer to them, so that the judge advocate, if he desires it, or if the court desires it, afterwards to examine them, they will have an opportunity of examining them.

6 American and English Encyclopædia of Law. Subject, Embezzlement, pages 451 to 457 inclusive, and subsequent pages.

Second, Wharton's Criminal Law, sections 1905, 1919, 1927. In fact, I refer to the subject Embezzlement, because the whole theory will sustain the position which I have taken.

United States versus Harper, 33 Federal Reporter, page 472.

Bogart's case, General Orders and Circulars, pages 89 and 90.

Winthrop's Military Law, volume 1, page 1011.

In fact, I say that the decisions of every text writer of authority sustain the position, I think, which I have taken.

If the court desires to examine them, and will inform me of any authority which they want, I shall be glad at any time to furnish them with the authority. The principles are well understood, well defined.

117 Now I say to this court in conclusion that there is a higher duty depending upon this court than the conviction of a person who may have done wrong; there is a higher duty than the conviction of a man who has appropriated to his own use funds which did not belong to him. You owe it as a duty to yourself to carefully consider the questions which are involved, and although you may repudiate the act, although you may be ready to denounce it as an honorable court, you did not make the law; you are sitting here simply to determine the law. Secretary Robeson said, "Unfortunately I find this to be the law," and, as the just judge to whom this matter was submitted, he did his duty to his conscience and to his country by declaring that, although the man was guilty of what seemed to him embezzlement, he could not be convicted of larceny or theft.

I call the attention of this court furthermore to the fact that the Government has not lost a cent. I call your attention to the previous good character of the accused, and I call your attention furthermore that if, in the determination of this case, you should hold the views which I have expressed, and there should be error on your part, you will have erred on the side of mercy; but if you should hold the opposite views of those which I have expressed, and it should afterwards turn out that you did wrong as a court under the law, you will have erred on the side other than for mercy.

I hope and I believe and I expect that this court will undertake to consider the difference between larceny and embezzlement, and above all things, for I maintain it with sincerity and I believe it is unanswerable, that this evidence ought to be excluded, and ought not to be con-

118 sidered, because the statute of the law said that he shall be first furnished with the charge and specification, and which was not done.

I concur heartily with my associate, Mr. Warner, in expressing to this court my high appreciation of the treatment which they accorded me, and I add the same to the able and distinguished judge advocate, who has managed his case with marked ability, and who has shown every courtesy to counsel representing the accused.

I thank the court for its attention.

119 The judge advocate replied to the argument of the counsel for the accused as follows:

I shall first refer to the question of arrest. I will quote a paragraph from article 1785 of the Navy Regulations of 1893.

"When, therefore, such competent officer shall decide to have a party tried by court-martial, he will cause such charges and specifications against him to be prepared as he may consider proper, and will transmit a true copy of them, with an order for the arrest or confinement of the accused, to the proper officer, who will deliver such order to the accused, and will carry it into effect by delivering to him a copy of the charges and specifications and, if an officer by receiving his sword."

"When, therefore, such competent officer shall decide to have a party tried by court-martial"—

Who is the competent officer? Art. 1780 of the same authority says that general courts-martial may be convened by the President, by the Secretary of the Navy, or by the commander in chief of a fleet or squadron. The exercise of this power by the commander in chief within the waters of the United States is forbidden except by expressed authority from the President, but this authority is usually granted, &c.

The competent authority in this case is the President of the United States or the Secretary of the Navy. The Secretary of the Navy decided to have the accused tried by court-martial, and he reached that decision finally when he signed the charge and the specification, and not before. That charge was immediately sent through the proper channels and delivered to the accused. In the first instance he was placed under arrest, and an examination of the records will show, if necessary, as the testi-
120 mony has shown, that he was placed under an arrest for embezzlement. He knew that at that time; he knew that he was placed under arrest for that purpose or for that crime. That was the first arrest. The action of the commanding officer of the ship was reported to the commandant of the station, and he referred the matter to the Secretary of the Navy, and the decision of the Secretary of the Navy is as plainly evidenced by the charge and the specification as you may wish to have it evidenced. I know of nothing plainer than that. When he decided to have the accused tried by court-martial he preferred the charge and specification against him, signed them, completed his decision by that act, forwarded them through the proper channels, and had them delivered to the accused. The original arrest continued up to the moment that the charge and specification were delivered. At that time the accused ceased to be under arrest as the prisoner of the commandant of this station for safe-keeping, and went under arrest, under these regulations, for trial by court-martial. So, under that head, you will see that the laws of the land have been fulfilled. (Art. 10.)

By Mr. HAPPER (of counsel for the accused). I will have to agree with the judge advocate in some respects. I agree with him and am willing to accept it as final that if we could produce authority for Mr. Cann to delegate his authority to the accused, that is, the authority of the commanding officer of the ship, that then the accused would be guilty of embezzlement and not of larceny.

By the JUDGE ADVOCATE. I call your attention to page 67 of the evidence. The question by the judge advocate is:

"The clerk had this money with your knowledge; this clerk, the accused, had this money with your knowledge?"

And his answer is, "Yes."

If he had it with his knowledge, and continued in the possession of that money with his consent, Captain Johnson gave his con-
121 sent and his authority for that possession; nobody can deny that.

By Mr. HAPPER (of counsel for the accused). Doesn't he deny that?

By Mr. WARNER (of counsel for the accused). He denies it himself, and he says that he gave no such authority. On cross-examination he said that he gave no such authority.

By the JUDGE ADVOCATE. He said not in writing did he give any orders in that way, but he knew it and that was authority, and he states that he knew it by information from Mr. Cann.

By Mr. WARNER (of counsel for the accused). He states that he gave authority for paying the petty officers and discharged men in that way.

By Mr. HAPPER (of counsel for the accused). He denies giving any authority.

By the JUDGE ADVOCATE. What is the difference of petty officer and discharged men, or special requisitions, or the officers, or anything else? What is the difference? I do not understand and I do not believe you can distinguish it. Paymaster Schenck has told you that it has been the custom for pay officers, during his thirty-odd year' of service, to leave money with their pay clerks for disbursements for Government purposes, and it has all the elements of a good custom. It has never been denied. In the case that is cited by the counsel, in Secretary Welles and Rufus E. Spalding, nobody has questioned that a paymaster is responsible under his bond. He does not deny it himself, and he has made up the shortage. He is civilly responsible for that money and has made up the shortage. He acknowledges that. Nobody questions it. But he is not the one who is criminally responsible for it. A crime has been committed. He is not criminally responsible for it. The man who committed the crime
122 is. The man who committed the crime is responsible for that. Of course, he recognized the fact that he can be and is held responsible under his bond for the loss. The Government has not lost the money, but Mr. Cann is out that amount. The loss not disappear except for the Government. The crime still remains; it is there. Mr. Cann is out $1,971 because the Government holds him civilly responsible. The counsel knows perfectly well that if he has a servant of any kind, a janitor in a building, a maid servant, a chambermaid, anything of that kind, and she commits certain acts, he would be responsible for her, but if his servant went into the street and committed assault and battery on some other he would not be. It is about the same thing. That man is held, the servant is held criminally responsible for his criminal act. If, on an errand of any kind by his authority, damage were done to the property of another person in the exercise of the orders given by Mr. Happer, Mr. Happer would unquestionably be responsible for the act of that servant to that extent, but he would not be for the servant who committed assault and battery.

By Mr. HAPPER (of counsel for the accused). As I have no reply, will you allow me to read two questions and answers, page 70?

By the JUDGE ADVOCATE. Certainly.

By Mr. HAPPER (of counsel for the accused, reading):

"343. Question. Did you ever give any orders to Paymaster Cann to deliver to his pay clerk money to meet the expenses of the ship during his absence?

"Answer. Never.

"344. Question. Were you ever requested by Paymaster Cann for such permission?

"Answer. Never."

By the JUDGE ADVOCATE (reading):

"346. Question. You have stated that money was left with the pay clerk to meet the expenses of the ship during the absence of the paymaster.

How did such knowledge come to your possession?"

123 And his answer to that is:

"Through Paymaster Cann, and also by the orders I sent to the office being honored."

What more do you wish than that?

By Mr. WARNER (of counsel for the accused). That was on another line of examination than that.

By the JUDGE ADVOCATE. I do not care what line it is. His official knowledge of the possession by the clerk of that money is ample authority for the paymaster to continue that. He does not deny him that privilege. The instant the commanding officer of a ship becomes acquainted with any act officially, any act that is performed by his subordinates, he is responsible for that act. You gentlemen know that too well. You have had some responsibility, many of you, and know that any act of your subordinates, whether right or wrong, coming to your knowledge, that the instant you become acquainted with it you are responsible for that act. If you take any steps, any official action in the matter, well and good; if you choose to overlook it well and good, but the responsibility rests with you. The absolute necessity for the leaving of the money in the possession of the pay clerk has been evidenced by every witness, acknowledged by the commanding officer. The very sending to the pay office by the commanding officer of orders which were honored, orders to be obeyed, shows you the authority right away. There is no use of going any further into that question. It is there. That settles it. It ends it. Then, according to the counsel, if there is a shortage in this amount, if the accused has appropriated this money for his own use fraudulently, that is embezzlement and not larceny.

But I call his attention to paragraph 4 of the Digest of Opinions of the Judge-Advocate-General, Mr. Winthrop, edition 1880, page 263:

124 "It is a peculiarity of the finding at military law that a court-martial, where of opinion that any portion of the allegations or the specifications is not proved, is authorized to find the accused guilty of part of the specification only, excepting the remainder; or in finding him guilty of the whole or any part, to substitute correct words or allegations in the place of such as are shown by evidence to have been inserted through error; and provided exceptions or substitutions leave the specification still appropriate to the charge." * * *

"Where the court believe that the accused is guilty of the charge, but not precisely as laid in the specification, they should find him guilty of the latter, but with such exceptions or substitutions as may be necessary to present the facts as proved on the trial, and then guilty of the charge."

There is ample authority for that. There is no necessity for going further into that.

By Mr. HAPPER (of counsel for the accused). You do not claim by that that they can alter these specifications now, and make the charge a different offence.

By the JUDGE ADVOCATE. What I claim is this, that they can find him guilty—not guilty of embezzlement, but guilty of larceny, if necessary.

By Mr. HAPPER (of counsel for the accused). You say that, then, in the face of the decision of Secretary Robeson?

By the JUDGE ADVOCATE. He does not exist, as Secretary.

By Mr. HAPPER (of counsel for the accused). His authority exists, though. It is the Supreme Court of the United States——

By the JUDGE ADVOCATE. It has ruled against him. This is the accepted authority of the Department to-day. (Referring to Winthrop.)

125 By Mr. HAPPER (of counsel for the accused). But you do not claim that that says any such thing, do you; that that authority says that they can substitute a new offence?

By the JUDGE ADVOCATE. I claim, for example, if you will allow me to illustrate, if a man is charged with desertion, but is found guilty of absence without leave, as the lesser offense is contained in the greater——

By Mr. HAPPER (of counsel for the accused). That is always true.

126 By the JUDGE ADVOCATE. Then if you will allow me to refer to your own authorities, I will refer to the American and English Encyclopedia of Law, volume 6, Definitions, page 451.

"Embezzlement is a crime unknown to the common law, but depends entirely upon statutory enactments; is a sort of statutory larceny, and may be defined as a fraudulent appropriation to one's own use of the money or goods of another, which were intrusted to his care as servant, bailee, or otherwise. Though kindred to theft, embezzlement is a separate and distinct offense. Theft involves the idea of an unlawful acquisition, whereas embezzlement is a fraudulent conversion of personal property after its possession has been lawfully acquired.

"467. It is held that an indictment for embezzlement lies against a clerk or servant for converting to his own use the money, goods, etc., of any other person as well as for converting to his own use the money, goods, etc., of his master or employer, which shall have come into possession or under his care by virtue of his employment."

Page 487. "Any officer of the United States, or his assistant, who steals, purloins, converts, or otherwise appropriates any money or other property of the United States, or belonging to any person, coming into his custody or possession in the execution of his office or employment, is guilty of embezzlement. But in order to sustain an indictment, under an act of Congress for embezzlement, the defendant must have violated some specific provision of the various acts of Congress."

The specification cites the act.

(Continuing:) "Under the various acts of Congress, any officer

127 or agent of the Government who fails to deposit public moneys when required, or a treasurer of public depositary who fails to safely keep the same, is guilty of embezzlement. And under these statutes it has been held that consular officers, a clerk in the post-office, clerk in the office of an assistant treasurer of the United States, a paymaster, or an additional paymaster in the Army, and any conversion of property by persons in the military or naval service of the United States, is embezzlement."

By Mr. HAPPER (of counsel for the accused). We do not deny that it must be the conversion by one who comes by it by virtue of his office.

By the JUDGE ADVOCATE (continuing). "The persons embraced in the act of March 2, 1863, section 1, providing that any person in the land or naval forces, etc., who embezzles money of the United States, shall be

subject to criminal punishment, are not liable to the penalties imposed by section 3 of the act. That section applies only to persons not in the military or naval forces."

That refers to Bogart's case, and Bogart's case was settled by the circuit court of California district before the Secretary of the Navy passed on it.

Page 492 of the same authority says:

"Clerks and servants of public officers who convert to their own use public moneys coming into their hands as such clerks and servants, and by reason of their employment as such, are punishable for embezzlement."

That is enough. The appointment of Mr. Sayre you have seen. His letter of acceptance you have seen. The purpose of his employment you know. He is placed there to assist the paymaster. The regula-
128 tions do not state specifically to assist in the accounts of the paymaster, but to assist him, and, to some extent, it has been evidenced by all the witnesses, it has been the custom for, I suppose—well, ever since the Navy has had a pay corps, that this authority has been delegated with the knowledge and consent of the Department. The pay clerk is not a bonded officer, and the paymaster is. Therefore, the Government holds the bonded officer civilly responsible for any crime such as embezzlement by the clerk, or larceny, if you please, under his bond, but punishes the pay clerk. In this case the Department has seen fit to give the pay officer duties taking him from his ship at various times, and in such manner that he is obliged to delegate some authority to his pay clerk. Section 1490 permits the commanding officer to do that, authorizes that delegation, and in this case, with your knowledge of military custom, the very definition of the word "command" explains to you that when the commanding officer of that ship became cognizant of the fact, by the paymaster's admission to him or his statement to him of the fact that the clerk, in the absence of the paymaster from that ship, honored the drafts; if it was not by his authority would he have sent that draft or that order, would he have sent it, and if he had known that the pay clerk had no money? It was in the possession of the pay clerk by authority of the commanding officer. He had full knowledge of it, and consequently was responsible for that. Therefore, the offence committed is not larceny, but embezzlement, and the evidence shows you that Paymaster Cann, after the delivery of certain sums of money on various dates between July 15, 1893, and October 10, 1894, the accused having been entrusted by Pay-
master James E. Cann, of the United States Navy, the paymaster of
129 said vessel, with sums of money belonging to the United States in various amounts, furnished and intended, as the evidence shows all the way through, for the naval service thereof, for disbursement for the purposes of said service during the temporary absence of said Paymaster Cann from the vessel, and on the first day of October, 1894, receipted to the said Paymaster Cann for money entrusted to his care in the sum of $2,701.44, did, between the said 15th day of July, 1893, and the 10th day of October, 1894, knowingly and wilfully misappropriate and apply to his own use and benefit, from the money so entrusted to him at various times as aforesaid, the sum of $1,971.11, or thereabouts, lawful money of the United States; this in violation of article fourteen of the articles for the government of the Navy.

He confessed, and the confession is good. It was free and voluntary, and not under compulsion. There was no hope of reward. He confessed to Paymaster Cann that he was short this money.

By Mr. HAPPER (of counsel for the accused). Didn't he say how the shortage occurred?

By the JUDGE ADVOCATE. He did not say how the shortage occurred; but that does not make any difference, for the simply reason that your own authorities tell you that when it was not produced it was prima facie evidence of that shortage in his possession. It was not produced. He said he was short. His admission on that point is good. He further stated to Paymaster Schenck that Paymaster Cann knew nothing about it. There were only two in charge of this money—Paymaster Cann and his assistant, Pay Clerk Sayre. If Paymaster Cann knew nothing about it, his clerk must have known. No other persons had access to it, in fact Paymaster Cann himself did not have access to the safe of the clerk.

130 He further admitted that in July last, the date of the last inspection prior to Paymaster Schenck's inspection, that the money was short, a portion of it—a small portion of it, perhaps. At that time he obtained money and made it up, so that the cash balanced.

Is there any other evidence that you wish? He has confesssed it. The confession is good; it is voluntary, without compulsion, and stands good in law.

As the counsel seemed to feel that Col. Winthrop is more or less biased by his military profession, I abstain from going into him, and have taken their own authorities to settle this question of embezzlement, and from these cases or doctrines we have accumulated a perfect avalanche which has swept away the slight obstruction they have imposed.

I am sorry to have detained you so long.

By Mr. HAPPER (*or* counsel for the accused). I would like to say that I have a short, written abstract. It is very short, just in the line of what I have already said, so that the court can glance at it if it is their pleasure to do so.

The court then, at 12.35 p. m., was cleared, the parties to the trial and the stenographer withdrawing.

The court at the same time took a recess until 2 o'clock p. m.

At 2 p. m. the court reassembled and was cleared for deliberation. All the members present.

131 The court having maturely considered the evidence adduced finds the specification "proved" and the accused, David B. Sayre, pay clerk, U. S. Navy, of the charge "guilty." The court therefore sentences the said David B. Sayre, pay clerk, U. S. Navy, to the following punishment, viz:

"To be confined in such place as the honorable Secretary of the Navy may designate for the period of two (2) years, to lose all pay that may become due him during such confinement, excepting the sum of ten (10) dollars per month, and the further sum of one hundred and fifty (150) dollars to be paid him at the expiration of confinement, the total loss of

pay amounting to two thousand two hundred and ten (2,210) dollars, then to be dishonorably dismissed from the naval service of the United States."

JOHN R. BARTLETT,
Captain, U. S. Navy, President of Court.
ROBERT P. LISLE,
Pay Inspector, U. S. Navy.
J. B. REDFIELD,
Paymaster, U. S. Navy.
N. E. NILES,
Lieutenant, U. S. Navy.
C. K. CURTIS,
Lieutenant, U. S. Navy. Members.
WM. W. GALT,
Paymaster, U. S. Navy.
B. T. WALLING,
Lieutenant, U. S. Navy.
THOS. W. RYAN,
Lieutenant, U. S. Navy.
JOHN A. LEJEUNE,
1st Lieutenant, U. S. M. C.
LITTLETON W. T. WALLER,
Lieutenant, U. S. M. C., Judge Advocate.

The court then at 3.45 p. m. adjourned, to await the action of the revising authority.

JOHN R. BARTLETT,
Captain, U. S. N., President of Court.
LITTLETON W. T. WALLER,
1st Lieutenant, U. S. M. C., Judge Advocate.

132 A.

NAVY DEPARTMENT,
Washington, October 25, 1894.

To Captain JOHN R. BARTLETT, U. S. Navy,
Commanding U. S. S. Atlanta,
Navy-Yard, Norfolk, Va.:

A general court-martial is hereby ordered to convene at the navy-yard, Norfolk, Va., at noon on Tuesday, the 30th day of October, 1894, or as soon thereafter as practicable, for the trial of David B. Sayre, pay clerk, U. S. Navy, and of such other persons as may be legally brought before it.

The court is composed of the following members, any five of whom are empowered to act, viz:

Captain John R. Bartlett, U. S. Navy; Pay Inspector Robert P. Lisle, U. S. Navy; Paymaster John B. Redfield, U. S. Navy; Lieutenant Nathan E. Niles, U. S. Navy; Lieutenant Clinton K. Curtis, U. S. Navy; Paymaster William W. Galt, U. S. Navy; Lieutenant Burns T. Walling, U. S. Navy; Lieutenant Thomas W. Ryan, U. S. Navy; First Lieutenant John A. Lejeune, U. S. Marine Corps, and of First Lieutenant

Littleton W. T. Waller, U. S. Marine Corps, as judge advocate. No other officers can be detailed without manifest injury to the service.

This employment on shore duty is required by the public interests.

H. A. HERBERT,
Secretary.

(Nav. and Comdt.)

S. C. L.

133 B.

NAVY DEPARTMENT,
Washington, October 25, 1894.

SIR: You are hereby authorized and directed to employ, at the customary market rates, such stenographic assistance as may be necessary for the purpose of recording, as required by law, the proceedings to be had and the testimony to be taken by the general court-martial of which you have this day been appointed judge advocate, ordered to convene at the navy-yard, Norfolk, Va., at noon on Tuesday, the 30th instant.

The commandant of the navy-yard, Norfolk, Va., has been directed to provide you with the necessary clerical assistance.

Very respectfully,

H. A. HERBERT,
Secretary.

S. C. L.

First Lieutenant LITTLETON W. T. WALLER, U. S. M. C.,
Office of Judge-Advocate-General, Navy Department.

(J. A. G.)

134 C.

Charge and specification of a charge preferred by the Secretary of the Navy against David B. Sayre, a pay clerk in the United States Navy.

Charge: Embezzlement, in violation of article fourteen of the articles for the government of the Navy.

Specification: In that the said David B. Sayre, a pay clerk in the United States Navy, attached to and serving as such on board the United States receiving ship "Franklin," at the navy-yard, Norfolk, Va., having, on various dates between July fifteenth, eighteen hundred and ninety-three, and October tenth, eighteen hundred and ninety-four, been entrusted by Paymaster James E. Cann, United States Navy, the paymaster of said vessel, with sums of money belonging to the United States in various amounts, furnished and intended for the naval service thereof, for disbursement for the purposes of said service during the temporary absence of said Paymaster Cann from the vessel, and having, on the first day of October, eighteen hundred and ninety-four, receipted to the said Paymaster Cann for money so entrusted to his care as aforesaid in the sum of two thousand seven hundred and one dollars and forty-four cents, did, between the said fifteenth day of July, eighteen hundred
135 and ninety-three, and tenth day of October, eighteen hundred and ninety-four, knowingly and wilfully misappropriate and apply to

his own use and benefit, from the money so entrusted to him at various times as aforesaid, the sum of nineteen hundred and seventy-one dollars and eleven cents or thereabouts, lawful money of the United States; this in violation of article fourteen of the articles for the government of the Navy.

H. A. HERBERT,
Secretary of the Navy.
S. C. L.

NAVY DEPARTMENT, *October* 25, 1894.

A copy delivered to the accused October 26, 1894.

LITTLETON W. T. WALLER,
First Lieutenant, U. S. M. C., Judge Advocate.

(J. A. G. and Lt. Waller.)

136 D.

NAVY DEPARTMENT,
Washington, October 25, 1894.

SIR: I transmit herewith charge, with specification, against David B. Sayre, pay clerk, U. S. Navy, who will be tried before the general court-martial of which you are judge advocate, ordered to convene at the navy-yard, Norfolk, Va., on Tuesday, the 30th instant.

You will summon such witnesses as may be required for his defense.

Very respectfully,

H. A. HERBERT, *Secretary.*
S. C. L.

First Lieutenant LITTLETON W. T. WALLER,
U. S. Marine Corps,
Office of Judge-Advocate General, Navy Department.

(J. A. G.)

137 E.

General Order, No. 143.

NAVY DEPARTMENT,
Washington, October 28, 1869.

I. Before a general court-martial convened at New York, by order of the Secretary of the Navy, dated July 31, 1869, of which court Commodore A. M. Pennock, U. S. N., was president, was arraigned and tried R. D. Bogart, paymaster's clerk, upon the following charges and specifications:

CHARGE I. "Stealing money of the United States."

Specification: "In this, that on or about the first day of December, 1868, R. D. Bogart, while serving as paymaster's clerk on board the U. S. receiving ship 'Vermont,' then lying at or near the New York Navy-Yard, did steal from the safe in the paymaster's office of said vessel a sum of money, amounting to $10,000 or thereabouts, belonging to the United States, furnished for use in the naval service thereof, thereby violating the act of Congress approved March 2, 1863, entitled 'An act to prevent and punish frauds upon the Government of the United States.'"

CHARGE II. "Fraud."

Specification: "In this, that the said R. D. Bogart, whilst employed as paymaster's clerk on board the U. S. receiving ship 'Vermont,' lying at or near the navy-yard, New York, did, during the year 1868, at various times, make false entries on the books of the paymaster of said vessel, thereby defrauding the United States.

CHARGE III. "Desertion."

Specification: "In this, that on or about the first day of December, 1868, the said R. D. Bogart, whilst employed as paymaster's
138 clerk on board the U. S. receiving ship 'Vermont,' at New York, did desert from said vessel and from the navy-yard, and did not return again until brought on board by a guard of marines, on the twenty-sixth day of July, 1869."

To these charges and specifications the accused pleaded "not guilty."

Finding: The court, upon full examination of the testimony and due consideration of the defense, find as follows:

"That the specification of the first charge is proved, except the amount of ten thousand dollars; a less amount proved;" that the accused is guilty of the first charge.

That the specification of the second charge is proved; that the accused is guilty of the second charge.

That the specification of the third charge is proved; that the accused is guilty of the third charge.

Sentence: "To be confined for three years in such penitentiary or prison as the Hon. Secretary of the Navy may designate, and at the expiration of said confinement to forfeit all pay and emoluments now due him or that may hereafter become due him, and to be dishonorably discharged from the naval service of the United States."

II. The Secretary of the Navy, after much consideration, feels compelled to disapprove and set aside the proceedings, findings, and sentence in this case.

R. D. Bogart, the accused, ceased to be a paymaster's clerk December 10, 1868, by the acceptance of his resignation and the appointment and qualification of his successor, more than six months before these proceed-
ings were instituted. Unless, therefore, there be some act of
139 Congress applicable to his case which prolonged his liability to military courts for military offenses after he had been allowed to leave the service he was not subject to trial by naval court-martial on charges preferred after that date.

Unfortunately there is no such law applicable to the second and third charges. For "desertion," therefore, he was not triable by this court, nor was he so triable for "fraud," as such per se, and apart from any of that class of offenses which include it. And even if the crime of fraud had been an offense embraced by the provisions of any act of Congress no prisoner could be held under a charge and specification so vague and uncertain as those made in this case.

For the offense of stealing money belonging to the United States Bogart remained liable to be tried by court-martial under the act of Congress above referred to; for that act continues liability for this crime beyond the term of service.

Unfortunately, however, the evidence in the case fails utterly to establish the offense charged, which is "theft." It tends to prove the other, and quite distinct, offense of embezzlement. Upon that proof the conviction was wrong, because illegal. The offenses of theft and embezzlement are quite distinct in law, and the act of Congress above referred to enumerates them separately as different offenses; and to hold Bogart guilty of theft because found guilty of embezzlement would be to disregard general rules of law established for the furtherance of justice, and binding upon all courts and revising authorities.

The Secretary of the Navy comes to these conclusions very reluctantly, compelled by the conviction that the safety of judicial proceedings is to be found only in the strict application of general rules, and that he is not authorized to substitute his individual will in those cases where
140 these rules fail by reason of their generality.

The proceedings against Bogart must, therefore, be set aside, and he must be redelivered into the custody of the United States marshal from whom he was received July 26, 1869. Rear-Admiral S. W. Godon, commanding the New York Navy-Yard, will cause him to be redelivered accordingly.

GEO. M. ROBESON,
Secretary of the Navy.

141 F.

UNITED STATES OF AMERICA,
NAVY DEPARTMENT,
Washington, October 26, 1894.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed are correct copies of the appointment and the acceptance and agreement of D. B. Sayre as a paymaster's clerk in the Navy, dated, respectively, July 6 and July 10, 1893, on file in this Department.

In testimony whereof I have hereunto set my hand and caused the seal of the Navy Department of the United States to be affixed, at the city of Washington, this twenty-sixth day of October, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States the one hundred and nineteenth.

[SEAL.] H. A. HERBERT,
Secretary of the Navy.

S. C. L.

142 NAVY DEPARTMENT, *Washington, July* 6, 1893.

SIR: Upon the nomination of Paymaster James E. Cann, U. S. N., you are hereby appointed a paymaster's clerk in the U. S. Navy, for duty on board of the U. S. R. S. "Franklin."

Enclosed is a blank form of acceptance for your signature, also a blank oath of office, which you will duly execute and return with your letter of acceptance to the Department; having done which you will proceed to the navy-yard, Norfolk, Va., and report to the commandant, on the 15th inst., for duty.

Very respectfully,
F. M. RAMSAY,
Acting Secretary of the Navy.

Paymaster's Clerk, D. B. SAYRE, U. S. Navy,
125 *Winthrop st., Taunton, Mass.*

143 *Acceptance and agreement.*

TAUNTON, MASS., *July 10th*, 1893.

SIR: I hereby accept the appointment of paymaster's clerk, dated July 6th, 1893, conferred on me, and do hereby oblige and subject myself during my service as paymaster's clerk to comply with and be obedient to such laws, regulations, and discipline of the Navy as are now in force, or that may be enacted by Congress or established by other competent authority, and herewith enclose oath of office duly executed.

D. B. SAYRE,
Paymaster's Clerk, U. S. N.

To the SECRETARY OF THE NAVY,
Washington, D. C.

144 G.

Single receipt.

No. Roll. U. S. R. S. "FRANKLIN,"
Norfolk, Va., Oct. 1, 1894.

For what charged.		
Clothing and small stores	$	
Money: For balance September 30		
Total	$2,701	44

Received from Jas. E. Cann, paymaster U. S. Navy, the amount of twenty-seven hundred and one dollars and forty-four cents, to be charged against my pay account, as per margin.

D. B. SAYRE,
Pay Clk., U. S. Navy.

Government use.

145 H.

Charge and specification of a charge preferred by the Secretary of the Navy against David B. Sayre, a pay clerk in the United States Navy.

Charge: Embezzlement, in violation of article fourteen of the articles for the goverment of the Navy.

Specification: In that the said David B. Sayre, a pay clerk in the United States Navy, attached to and serving as such on board the United States receiving ship "Franklin," at the navy-yard, Norfolk, Virginia, having on various dates between July fifteenth, eighteen hundred and ninety-three, and October tenth, eighteen hundred and ninety-four, been entrusted by Paymaster James E. Cann, United States Navy, the paymaster of said vessel, with sums of money belonging to the United States, in various amounts, furnished and intended for the naval service thereof, for disbursement for the purposes of said service during the temporary absence of said Paymaster Cann from the vessel, and having on the first day of

October, eighteen hundred and ninety-four, receipted to the said Paymaster Cann for money so entrusted to his care as aforesaid in the sum of two thousand seven hundred and one dollars and forty-four cents, did, between the said fifteenth day of July, eighteen hundred and ninety-
146 three, and tenth day of October, eighteen hundred and ninety-four, knowingly and wilfully misappropriate and apply to his own use and benefit, from the money so entrusted to him at various times as aforesaid, the sum of nineteen hundred and seventy-one dollars and eleven cents, or thereabouts, lawful money of the United States; this in violation of article fourteen for the articles of the government of the Navy.

H. A. HERBERT,
Secretary of the Navy.
S. C. L.

NAVY DEPARTMENT, *October* 25, 1894.

A copy delivered to the accused.
(Comdt.)

147 GOVERNMENT'S EXHIBIT B.

4475–94. C.
E. P. H.

NAVY DEPARTMENT,
Washington, October 13, 1894.

SIR: Referring to the Department's letter of this date, informing you that a court of inquiry, of which Captain Frank Wildes, U. S. Navy, is president, has been ordered to convene at the navy-yard, Norfolk, Va., on Tuesday, the 16th instant, for the purpose of inquiring into the method in which the pay department of the U. S. R. S. "Franklin" has been conducted during the time covered by the service of Paymaster James E. Cann, U. S. Navy, on board said vessel, and referring also to your report of the 11th instant, from which it appears that you have directed that Pay Clerk D. B. Sayre, U. S. Navy, be retained in close confinement until further orders, you are instructed to permit Pay Clerk Sayre to be present, under the direction of the court of inquiry, during its sessions; to have the fullest opportunity to consult with his attorneys or others from time to time, in so far as such consultations may be necessary to his defense, and to inspect such papers and documents appertaining to the records of the pay department of the "Franklin" as he may desire to examine in connection with the preparation of any statement or defense which he may have to submit to the court.

While affording Pay Clerk Sayre, as herein directed, the fullest opportunity to prepare and submit to the court such explanation and defense as he may have to make, you will, in carrying out these instructions, take such steps as may be necessary to insure his safe-keeping, and the proper care of any papers or records which may be examined by him.

Very respectfully,

148 W. MCADOO,
Acting Secretary.
C. H. L.

The COMMANDANT,
Navy-Yard, Norfolk, Va.

COMMANDANT'S OFFICE,
Navy-Yard, Norfolk, Va.

Received Oct. 15, 1894.
Copy and return within 24 hours.
U. S. R. S. "Franklin," Norfolk, Va., Oct. 15, '94.
Copied.

GOVERNMENT'S EXHIBIT C.

WEDNESDAY, *October* 10, 1894.

Merid. to 4 p. m.

By order of comd'g. officer confined Pay Clerk D. B. Sayre to his room under sentry's charge, for embezzlement, to await an investigation.

(Sgd.) JAMES HILL, *Mate, U. S. N.*

TUESDAY, *October* 16, 1894.

From 8 a. m. to merid.

Pay Clerk D. B. Sayre, under charge of 1st Sergt. Dolphin, left the ship to attend the court of investigation at the navy-yard.

(Sgd.) H. KUHL, *Mate, U. S. N.*

Merid. to 4 p. m.

At 1.20 D. B. Sayre, pay clerk, returned on board and was reconfined in his room under sentry's charge.

(Sgd.) H. KUHL, *Mate, U. S. N.*

149 WEDNESDAY, *October* 17, 1894.

From 8 a. m. to merid.

Pay Clerk D. B. Sayre, in charge of 1st Sergeant Dolphin, left the ship to appear before court of investigation at navy-yard. Pay Clerk D. B. Sayre returned on board.

(Sgd.) JAMES HILL, *Mate, U. S. N.*

Merid. to 4 p. m.

Pay Clerk D. B. Sayre left the ship in charge of 1st Sergeant Dolphin to appear before court of investigation at navy-yard, and returned on board at 3.30 and was sent to his room under sentry's charge.

(Sgd.) JAMES HILL, *Mate, U. S. N.*

THURSDAY, *October* 18, 1894.

From 8 a. m. to merid.

Pay Clerk D. B. Sayre sent over to the court of inquiry, under charge of 1st serg't, and returned in due time.

(Sgd.) D. M. W. NASH, *Carpenter, U. S. N.*

FRIDAY, *October* 19, 1894.

From 8 a. m. to merid.

At 10.30 sent Pay Clerk D. B. Sayre to appear before the court of investigation at navy-yard, in charge of 1st Serg't Dolphin.

(Sgd.) J. H. BROWN, *Boatswain, U. S. N.*

Merid. to 4 p. m.

At 12.10 1st Sergeant Dolphin, with Pay Clerk Sayre, returned on board from the court of investigation.

(Sgd.) J. H. BROWN, *Boatswain, U. S. N.*

FRIDAY, *October* 26, 1894.

Merid. to 4 p. m.

Charges delivered to Pay Clerk D. B. Sayre.

(Sgd.) D. M. W. NASH, *Carpenter, U. S. N.*

150 TUESDAY, *October* 30, 1894.

From 8 a. m. to merid.

Pay Clerk D. B. Sayre was sent to the yard in charge of 1st serg't, to appear before a court-martial.

(Sgd) D. M. W. NASH, *Carpenter, U. S. N.*

From 4 to 8 p. m.

Pay Clerk D. B. Sayre was returned on board in charge of 1st serg't, and was reconfined.

(Sgd.) D. M. W. NASH, *Carpenter, U. S. N.*

WEDNESDAY, *October* 31.

From 8 a. m. to merid.

Pay Clerk D. B. Sayre, in charge of 1st Serg't Dolphin, was sent to the navy-yard to appear before court-martial. Pay Clerk D. B. Sayre, in charge of 1st Serg't Dolphin, also Lieut. T. W. Ryan, U. S. N., returned on board from court-martial duty.

(Sgd.) J. H. BROWN, *Boatswain, U. S. N.*

Merid. to 4 p. m.

Sent Pay Clerk D. B. Sayre, in charge of 1st Serg't Dolphin, to appear before court-martial. Lieut. T. W. Ryan, U. S. N., returned on board from court-martial duty, also Pay Clerk D. B. Sayres in charge of 1st Serg't Dolphin.

(Sgd.) J. H. BROWN, *Boatswain, U. S. N.*

THURSDAY, *November* 1, 1894.

From 8 a. m. to merid.

Pay Clerk D. B. Sayre, in charge of 1st Serg't Dolphin, left the ship to appear before a court-martial convened in the navy-yard.

(Sgd.) H. KUHL, *Mate, U. S. N.*

Merid. to 4 p. m.

Pay Clerk D. B. Sayre, in charge of 1st Serg't Dolphin, returned on board from court-martial and reconfined. At 1.15 Pay Clerk D.
151 B. Sayre, in charge of 1st Serg't Dolphin, left the ship to appear before court-martial. At 2.35 Pay Clerk D. B. Sayre, in charge of 1st Serg't Dolphin, returned on board and was reconfined.

(Sgd.) H. KUHL, *Mate, U. S. N.*

FRIDAY, *November* 2, 1894.

From 8 a. m. to merid.

At 9.50 Pay Clerk D. B. Sayre in charge of 1st Serg't Dolphin left the ship to appear before court martial.

(Sgd.) JAMES HILL, *Mate, U. S. N.*

Merid. to 4 p. m.

Lieut. T. W. Ryan, U. S. N., and Pay Clerk D. B. Sayre returned on board, the latter was confined to his room under charge of sentry.

(Sgd.) JAMES HILL, *Mate, U. S. N.*

TUESDAY, *November* 20, 1894.

Merid. to 4 p. m.

The commanding officer delivered a copy of the letter relative to the sentence by a general court-martial of Pay Clerk David B. Sayre, U. S. N., to the latter officer, and notified him that he would be sent to the naval prison at the Boston Navy-Yard per steamer to-morrow evening, the 21st inst. This by order of the commandant.

(Sgd.) H. KUHL, *Mate, U. S. N.*

WEDNESDAY, *November* 21, 1894.

From 4 to 8 p. m.

At 5.25 by direction of commandant, Pay Clerk David B. Sayre, U. S. N., was turned over to the custody of Lieut. F. H. Tyler, U. S. N., to be transferred to the naval prison at Boston Navy-Yard, Mass., in conformity with the sentence of a naval court-martial, approved by the Secretary of the Navy. At 6.30 Pay Clerk David B. Sayre, U. S. N., returned on board under the custody of U. S. Marshal, an injunc-
152 tion having been served on Lieut. F. H. Tyler, U. S. N., on the Boston steamer, and a writ of habeas corpus on Capt. M. L. Johnson, comd'g this ship, to produce the body of David B. Sayre on Monday, November 26, 1894, at 12 m. before the judge of the circuit court of the U. S. David B. Sayre, pay clerk, U. S. N., was re-confined until further orders.

(Sgd.) H. KUHL, *Mate, U. S. N.*

MONDAY, *November* 26, 1894.

From 8 a. m. to merid.

At 11.20 Pay Clerk D. B. Sayre left the ship in charge of master at arms to report to Lieut. F. Tyler, U. S. N., and appear before the United States court in Norfolk, in answer to a writ of habeas corpus issued by said court.

(Sgd.) JAMES HILL, *Mate, U. S. N.*

Merid. to 4 p. m.

Pay Clerk D. B. Sayre, a court-martial prisoner, was by the decision of Judge Hughes, of the U. S. circuit court, removed from the custody of the authorities of this ship, and turned over to the U. S. marshal and subsequently bailed for one thousand dollars.

(Sgd.) D. M. W. NASH, *Carpenter, U. S. N.*

TUESDAY, *November* 27, 1894.

From 8 a. m. to meridian.

Pay Clerk D. B. Sayre, U. S. N., visited this ship and remained on board one and one-half hours.

(Sgd.) , *Carpenter, U. S. N.*

U. S. R. S. "FRANKLIN,"
Navy-Yard, Norfolk, Va., November 29, 1894.

I hereby certify that the foregoing are correct abstracts from the log of this vessel wherein reference is made to Pay Clerk D. B. Sayre, U. S. N.

[SEAL.] A. P. OSBORN,
Lieutenant, U. S. N., Commanding.

153 GOVERNMENT'S EXHIBIT D.

J. W. C. C.
5232–94.

UNITED STATES OF AMERICA,
NAVY DEPARTMENT,
Washington, November 27, 1894.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed are correct copies of the following described papers, viz:

Precept convening a court of inquiry to investigate the books and accounts of the pay department of the U. S. R. S. "Franklin."

Letter, dated October 13, 1894, to Pay Clerk David B. Sayre, U. S. Navy, informing him of his right to be present before said court of inquiry.

Letter, dated October 25, 1894, informing Sayre of the findings of the court of inquiry.

General Court-Martial Order No. 102, dated November 17, 1894, containing the charge and specification in the case of Pay Clerk Sayre.

All taken from the files of this Department.

In testimony whereof I have hereunto set my hand, and caused the seal of the Navy Department of the United States to be affixed, at the city of Washington, this twenty-seventh day of November, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States the one hundred and nineteenth.

[SEAL.] W. MCADOO,
Acting Secretary of the Navy.
L. C. L.

154 4475–94. C.

To Captain FRANK WILDES, U. S. Navy,
Navy-Yard, Norfolk, Va.:

A court of inquiry consisting of yourself as president, of Pay Inspector Arthur J. Pritchard and Lieutenant-Commander Chapman C. Todd, U. S. Navy, as members, and of First Lieutenant Littleton W. T. Waller, U. S. Marine Corps, as judge advocate, is hereby ordered to convene at the navy-yard, Norfolk, Va., at noon on Tuesday, the 16th day of October, 1894, or as soon thereafter as practicable, for the purpose of investigating the books and accounts of the pay department of the U. S. R. S. "Franklin" during the period in which Paymaster James E. Cann, U. S. Navy, has been in charge of the same.

The court will diligently and thoroughly inquire into the method in which the books and accounts of the pay department of said vessel have been kept, and the manner in which the public money has been disbursed by Paymaster James E. Cann, U. S. Navy; whether the regulations for the government of the Navy of the United States in matters relating to the pay department have been evaded, neglected, or violated by Paymaster Cann; and the extent to which, if at all, the duties of the pay officer of said vessel have been delegated to his clerk.

The court will particularly investigate all the circumstances connected with the shortage of $1,971.41 found to exist in the public funds in the custody of Paymaster Cann, as shown by the report of Pay Director Caspar Schenck, U. S. Navy, dated the 10th instant, which report is hereto attached and made a part of this precept.

Upon the conclusion of the investigation the court will report its proceedings and the testimony taken, with a full and detailed statement
155 of any irregularities discovered, and all the facts which it may deem to be established by the evidence adduced, together with its opinion as to who is responsible for such irregularities, and as to what further proceedings, if any, should be had in the matter.

If the court shall be of opinion that further proceedings should be had in the matter, it will include in its report a succinct statement as to the person or persons against whom, and the specified matter upon which, such proceedings should be had.

This employment on shore duty is required by the public interests.

Given under my hand at the Navy Department, Washington, D. C., this thirteenth day of October, eighteen hundred and ninety-four.

W. McADOO,
Acting Secretary of the Navy.

(Comdt.)
4475–94 C.

NAVY DEPARTMENT, *Washington, October* 13, 1894.

SIR: A court of inquiry, of which Captain Frank Wildes, U. S. Navy, is appointed president, has been ordered to convene at the navy-yard, Norfolk, Va., at noon on Tuesday, the 16th instant, for the purpose of inquiring into the method in which the pay department of the U. S. R. S. "Franklin" has been conducted during the time covered by the service of Paymaster James E. Cann, U. S. Navy, on board said vessel.

You have a right to be present during the investigation, to cross-examine the witnesses, and offer evidence before the court, should you desire to do so.

156 Very respectfully, W. McADOO,
Acting Secretary.

Pay Clerk D. B. SAYRE, U. S. Navy,
U. S. R. S. "Franklin,"
Navy-Yard, Norfolk, Va.

(Comdt.)
4622–94 C.

NAVY DEPARTMENT,
Washington, October 25, 1894.

SIR: I transmit herewith, for your information, a copy of the findings and opinions of the court of inquiry convened at the navy-yard, Norfolk,

Va., by the Department's order of the 13th instant, for the purpose of investigating the books and accounts of the pay department of the U. S. R. S. "Franklin" during the period in which Paymaster James E. Cann, U. S. Navy, has been in charge of the same.

The proceedings, and the findings, and opinion of the majority of the court, have this day been approved.

Very respectfully,

H. A. HERBERT, *Secretary.*

Pay Clerk DAVID B. SAYRE, U. S. Navy,
U. S. R. S. "Franklin,"
Navy-Yard, Norfolk, Va.

(Comdt.)

157 General court-martial. Order No. 102.

NAVY DEPARTMENT,
Washington, November 17, 1894.

1. Before a general court-martial, convened at the navy-yard, Norfolk, Va., October 30, 1894, and of which Captain John R. Bartlett, U. S. N., is president, and First Lieutenant Littleton W. T. Waller, U. S. M. C., judge advocate, was arraigned and tried David B. Sayre, pay clerk, U. S. Navy.

Charge: "Embezzlement, in violation of article fourteen of the articles for the government of the Navy."

"Specification: "In that the said David B. Sayre, a pay clerk in the United States Navy, attached to and serving as such on board the United States receiving ship "Franklin," at the navy-yard, Norfolk, Virginia, having, on various dates between July fifteenth, eighteen hundred and ninety-three, and October tenth, eighteen hundred and ninety-four, been entrusted by Paymaster James E. Cann, United States Navy, the paymaster of said vessel, with sums of money belonging to the United States, in various amounts, furnished and intended for the naval service thereof, for disbursement for the purposes of said service during the temporary absence of said Paymaster Cann from the vessel, and having, on the first day of October, eighteen hundred and ninety-four, receipted to the said Paymaster Cann for money so entrusted to his care as aforesaid, in the sum of two thousand seven hundred and one dollars and forty-four cents, did, between the said fifteenth day of July, eighteen hundred and ninety-three, and tenth day of October, eighteen hundred and ninety-four, knowingly and wilfully misappropriate and apply to his own use and benefit, from the money so entrusted to him at various times as aforesaid, the sum of nineteen hundred and seventy-one dollars and
158 eleven cents or thereabouts, lawful money of the United States. This in violation of article fourteen of the articles for the government of the Navy."

To which charge and specification the accused, David B. Sayre, pay clerk, U. S. Navy, pleaded "not guilty."

Finding: The court, after full and mature deliberation, found as follows: The specification "proved."

And that the accused, David B. Sayre, pay clerk, U. S. Navy, is of the charge "guilty."

Sentence: The court thereupon sentenced the said David B. Sayre, pay clerk, U. S. Navy, "to be confined in such place as the honorable Secretary of the Navy may designate for the period of two (2) years; to lose all pay that may become due him during such confinement, excepting the sum of ten (10) dollars per month, and the further sum of one hundred and fifty (150) dollars to be paid him at the expiration of confinement, the total loss of pay amounting to two thousand two hundred and ten (2,210) dollars, then to be dishonorably dismissed from the naval service of the United States."

11. The proceedings, finding, and sentence of the general court-martial in the foregoing case of David B. Sayre, pay clerk, U. S. Navy, are approved and the sentence will be duly executed.

The prison at the navy-yard, Boston, Mass., is designated as the place for the execution of so much of the sentence as relates to confinement.

H. A. HERBERT, *Secretary of the Navy.*

159 GOVERNMENT'S EXHIBIT E.

J. W. C. C.

UNITED STATES OF AMERICA,
NAVY DEPARTMENT,
Washington, November 23, 1894.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed are correct copies of the appointment and acceptance and agreement of David B. Sayre as a paymaster's clerk in the Navy, dated, respectively, July 6 and July 10, 1893, of file in this Department.

In testimony whereof, I have hereunto set my hand, and caused the seal of the Navy Department of the United States to be affixed, at the city of Washington, this twenty-third day of November, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States the one hundred and nineteenth.

[SEAL.] W. MCADOO,
Acting Secretary of the Navy.
L. C. L.

NAVY DEPARTMENT,
Washington, July 6, 1893.

SIR: Upon the nomination of Paymaster James E. Cann, U. S. N., you are hereby appointed a paymaster's clerk in the U. S. Navy, for duty on board of the U. S. R. S. "Franklin."

Enclosed is a blank form of acceptance for your signature, also a blank oath of office, which you will duly execute and return, with your letter of *of* acceptance, to the Department; having done which, you will proceed to the navy-yard, Norfolk, Va., and report to the commandant, on the 15th inst., for duty.

160 Very respectfully, F. M. RAMSAY,
Acting Secretary of the Navy.

Paymaster's Clerk D. B. SAYRE, U. S. Navy,
#125 *Winthrop st., Taunton, Mass.*

10450——6

Acceptance and agreement.

TAUNTON, MASS., *July 10th*, 1893.

SIR: I hereby accept the appointment of paymaster's clerk, dated July 6th, 1893, conferred on me, and do hereby oblige and subject myself, during my service as paymaster's clerk, to comply with, and be obedient to, such laws, regulations, and discipline of the Navy as are now in force, or that may be enacted by Congress or established by other competent authority, and herewith enclose oath of office duly executed.

D. B. SAYRE,
Paymaster's Clerk, U. S. N.

161 The circuit court of the United States, eastern district of Virginia, at Norfolk.

In the matter of the application of David B. Sayre for a writ of habeas corpus. The finding of the court.

On this 28th day of November, 1894, this cause came on to be heard upon the application for a writ of habeas corpus directed to Captain M. L. Johnson, commanding the United States receiving ship "Franklin," stationed at the navy-yard at Norfolk, Va., and after argument on behalf of the petitioner, David B. Sayre, by his counsel, John W. Happer and A. E. Warner, esquires, and by Francis R. Lassiter, United States attorney for the said district, and Littleton W. T. Waller on behalf of the United States, and the said Captain M. L. Johnson, commanding the United States receiving ship "Franklin," and the court being fully advised in the premises, on the third day of December, 1894, doth find:

162 David B. Sayre was the clerk of James E. Cann, paymaster in the United States Navy, whose places of duty were on the receiving ship "Franklin," lying at the Norfolk Navy-Yard, in the navy-yard Port Royal, South Carolina, and on the monitors lying in the fresh water of James River, below Richmond. Sayre was accused of embezzling funds of the Navy in the custody of Paymaster Cann, to the amount of about two thousand dollars.

The charge was first examined by a naval court of inquiry sitting at the Norfolk Navy-Yard, which found against him. The case was then sent to a court-martial, specially called by the Secretary of the Navy, which also sat at the Norfolk Navy-Yard. The court-martial found against the accused, and sentenced him "to be confined in such place as the honorable Secretary of the Navy may designate for the period of two years; to lose all pay that may become due him during such confinement, excepting the sum of ten dollars per month and the further sum of one hundred and fifty dollars to be paid him at the expiration of confinement, the total loss of pay amounting to two thousand two hundred and ten dollars, then to be dishonorably dismissed from the naval service of the United States.

This sentence was approved by a special order of the Secretary of the Navy, dated November 17th, 1894, as follows: "The proceedings,
163 findings, and sentence of the general court-martial in the foregoing case of David B. Sayre, pay clerk, U. S. Navy, are approved, and the sentence will be duly executed. The prison at the navy-yard, Boston, Mass., is designated as the place for the execution of so much of the sentence as relates to confinement."

The Norfolk Navy-Yard, where Sayre was tried, is in sight of the building in which the civil courts of the United States are held.

The prison at Boston as shown in evidence to be one of narrow cells and limited appliances for comfort, and such as would seem to render confinement in it for a long term a punishment which the law regards as "cruel and unusual." One of the Secretaries of the Navy, in General Order 163, has said, "the only means of confinement at the command of the Department is in the confined prison quarters on shipboard, or in some small cells which are provided at the Marine Barracks, in the various navy-yards. These are intended and chiefly used for short terms of punishment for the enforcement of discipline, and for the temporary safe-keeping of prisoners held for trial for serious offences. Necessarily of narrow compass, and not constituted nor intended for purposes of long imprisonment, they are neither commodious nor secure, and have not the proper arrangements to make them hea'thful, beneficial, or humane."

Under the charge and this sentence, Sayre had been held in confinement since the date of his arrest on the 30th of October, 1894, when, on the 21st of November, he filed a petition in this court by counsel, praying that the high prerogative writ of habeas corpus might issue, and that he might be corporeally brought before this court and allowed to show, if in
his power to do so, that he had been unconstitutionally and ille-
164 gally deprived of his liberty, and was held in unlawful durance awaiting unlawful punishment.

The writ was issued, the prisoner brought before the court and the prayer of the petitioner tried on the 26th ultimo. The case was ably argued on the side of the prisoner, and was presented with extraordinary ability and learning by the judge-advocate of the Navy having charge of this case, and by the district attorney of the United States. At the trial many interesting questions of fact and important questions of law were gone into, which I do not think it necessary to consider.

Towering high above all these minor matters is the great question whether, in the case of this petitioner, be he ever so guilty, be he ever so unworthy of clemency, be he ever so deeply sunk in depravity and dishonor, his rights as a citizen of the United States have been violated.

It is in the persons of the weak and humble, in the persons of the unworthy, humiliated, and degraded, that the rights of citizens are most usually violated, bad precedents established, and dangerous usages given origin. The courts are bound to ignore the merit or want of merit, be that however apparent, in the person whose rights are involved, in cases like the one at bar, and to view each case solely with reference to the law which governs it.

Amendment five of the Constitution of the United States provides that, "No person shall be held to answer for a capital or otherwise infamous crime, unless a presentment or indictment of a grand jury, except in
cases arising in the land or naval forces, or in the militia, when in
165 active service in time of war or public danger; nor shall any person * * * be deprived of life, liberty, or property, without due process of law," &c., &c.

And article eight provides that "cruel and unusual punishments shall not be inflicted."

It is plain that this law of laws applies only to crimes which are punishable by death, or by such confinement in prison as entails infamy upon the condemned. It does not in the least degree affect those punishments inflicted in the military service which are for crimes amenable only to fines, short imprisonments, or the milder means of discipline.

That sailors, commissioned officers, paymasters, and others are amenable to sentences of courts-martial inflicting these lighter punishments for various delinquencies need not be enquired into here. I freely concede that none of the persons employed in the naval establishment, who are subject to the ordinary naval courts-martial, and to the minor punishments which they inflict for breaches of duty or discipline, are protected from such minor punishments by the provisions of the fifth amendment of the Constitution of the United States.

The question with which I have to deal is a different one. It is, whether an employee of the naval establishment may be sentenced by court-martial, a purely military court, in time of peace, sitting on land, in sight of the civil courts, to the punishment of death, or to infamous confinement in prison. The Supreme Court of the United States has declared in several cases that offences involving punishment in the penetentiaries or general State prisons of the country are to be regarded as within the
166 class of infamous crimes. (See 114 U. S., 417; 117 U. S., 348; 126 U. S., 393.) The case at bar is, therefore, clearly one of the class to which the 5th amendment applies.

The only question left is whether this case is among the exceptions described by that amendment, in the clause "except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger." It is not pretended that the country is now in actual war or in public danger. It is a time of profound peace, no danger threatening from within or without. And therefore it would seem absolutely plain that the infliction of an infamous punishment upon this prisoner by a court-martial sitting on land at this time, without indictment by grand jury and without trial by a petit jury, is a clear infringement of the fifth amendment of the Constitution.

But counsel for the United States contend that the clause allowing capital punishments and infamous confinements to be inflicted by naval courts-martial is not limited to periods of actual war and public danger; and they cite an authority in re Bogart, 2 Sawyer, 396, in which a court of the United States has held that that limitation applies only to the militia. Their contention is that though the militia may not inflict such punishments except in time of war and public danger, yet that naval and army courts-martial may inflict them in time of peace as well as war. My oath of office does not permit me to concur in such a contention; does not permit me to defer to the precedent cited by counsel for the Government.

High as the authority of Judge Sawyer, of California, is with all our Federal courts, his ruling that the clause of the fifth amendment
167 under consideration refers only to the militia is absolutely inadmissable.

The first ten amendments of the Constitution were demanded by the States in the act of ratifying the Constitution of 1789. They were intended to serve the purpose of a bill of rights. Their adoption totidem verbis as they now stand was not demanded in form by the ratifying

States; but their substance was made a condition which was to follow the formal adoption of the Constitution itself. And what was the gravamen of these amendments?

In the Declaration of Independence it had been complained of the British monarch that "He has kept among us, in times of peace, standing armies without the consent of our legislature;" and that "He has affected to render the military independent of, and superior to, the civil power."

This was the grievance uppermost in the minds of the States when they were called upon to ratify a Constitution to which no bill of rights had been prefixed. The bête noire was a standing army. So far from their apprehensions of military usurpation having been directed to the militia, they looked to the militia as a protection from them, and they actually demanded the adoption of amendment two, which declared that "A well-regulated militia being necessary to the security of a free state, the right of a free people to keep and bear arms shall not be infringed." The idea that the militia were dangerous to the liberties of the people in time of peace did not enter the brain of mortal man.

To hold that the limitation of the power of military courts-martial to inflict death and infamous punishments is to those held by the militia is to forget history, to ignore the reason of the law, and to treat the militia, intended as a safeguard of our liberties, as a destroyer of them. I
168 will not accede to such a reading of the fifth amendment, and must hold that it is not competent for a naval court-martial, in time of peace, sitting on land, with the civil courts open and in sight, with all the machinery of grand and petit juries ready at call to be brought into requisition to denounce a sentence of punishment by death or by infamous imprisonment upon a paymaster's clerk doing duty on land.

The contention of counsel was so strenuous on the question whether Paymaster Cann was on shore or sea duty that I feel bound to consider that question, though strictly unnecessary to the decision of the case at bar. As before stated, the field of duty of this paymaster was at Port Royal, South Carolina, where there is no receiving ship; on the monitors below Richmond, where, so far from being at sea, those vessels are moored in fresh water to escape the evil effects of salt water upon them, and on the receiving ship "Franklin," a large vessel without sails or steam power anchored in the land-locked harbor at the Norfolk Navy-Yard, with no power of locomotion.

A receiving ship like the "Franklin" is chiefly used for the reception of landsmen newly recruited for the naval service, and for training these recruits and drilling and otherwise educating and preparing them for that service. It is an establishment for sailors similar to the Naval Academy at Annapolis for officers, and it has never been contended that the officers and cadets when at Annapolis were on sea duty. A receiving ship is also used as a boarding house for the sailors of the Navy in the intervals between their discharge from one ship of war and their assignment to another. The "Franklin" is distinctly a ship on shore duty, and
169 for this ship to be taken out to sea for sea duty would be ipso facto to make it cease to be a receiving ship. The service to which it is devoted is necessarily a service in port and a shore service. I think, therefore, that in respect to every part of Paymaster Cann's field of service his duties were those of the shore and not of the sea. Two decisions of the

Supreme Court of the United States are cited in contradiction of this proposition (U. S. v. Symonds, 12 U. S., 46; U. S. v. Strong, 125 U. S., 656); but those decisions only went to the point of holding that certain naval officers who were assigned to duty under the circumstances recited by the court were entitled to the same pay and emoluments while on duty on the particular receiving ships on which they were under orders special to their own cases which they would have been entitled to if they had been at sea. There is nothing in those cases to countenance the idea that service on receiving ships held permanently in port, and not declared by special orders to be on sea duty, entitles to sea pay and emoluments officers and seamen who perform only the ordinary duties incident to service on receiving ships. I dismiss, therefore, this branch of the case.

I am free to say generally that it is not the policy of the civil courts to interfere with those of the two military establishments in the general discharge of their duties. It is not their policy to look into the regularity of the proceedings of courts-martial in dealing with offences against duty and discipline. The law provides, in the Secretaries and the President, competent tribunals and methods of review, and the civil courts assume with confidence that these functionaries discharge their duties well
170 and wisely. But when courts-martial exceed the limits prescribed by law in their findings, and pronounce sentences solemnly inhibited by the paramount law of the land, the civil courts are bound to interfere to stay the military hand. In such cases the civil courts dare not refuse to pronounce against military usurpations of power, however honestly and conscientiously committed, and however honorable and distinguished the officers may be, who unadvisedly transcend the limits of just authority.

I have said enough to indicate that with no part of the sentence of the court-martial which I have had under review in this case of D. B. Sayre, do I feel called upon to interfere, except with that part of it which consigns petitioner to an infamous punishment. Such a punishment can not be inflicted upon any citizen of the United States in time of peace, on land, in close proximity to the civil courts, except through indictment of a grand jury, and upon a verdict of his peers.

The court-martial which tried the petitioner had no jurisdiction to pronounce such a sentence, and its judgment in respect to the infamous imprisonment was coram non judice.

I will make an order discharging the petitioner from the infamous punishment and releasing him from custody as to that part of the sentence, but without prejudice to the sentence of the court-martial in any other respect.

RO. W. HUGHES, *Judge.*

171 The circuit court of the United States, eastern district of Virginia, at Norfolk.

Entry ordering discharge of prisoner.

In the matter of the application of David B. Sayre for a writ of habeas corpus. On this 14th day of December, 1894, came the parties by their counsel, and this cause coming on to be heard upon the petition and amended petition in this cause filed, and upon the general issue pleaded

thereto, and upon the writ of habeas corpus awarded in this cause on the 21st day of November, 1894, and upon the return thereto, and upon the production in court of the body of said David B. Sayre, and upon the evidence admitted upon the hearing of this cause on 28th day of November, 1894, and after argument of counsel, and the court being fully advised in the premises, the court finds that said petitioner is unlawfully restrained of his liberty, but without prejudice in any other respect to the sentence of the court-martial pronounced upon the said petitioner on the 2nd day of November, 1894, and approved by a special order of the Secretary of the Navy, dated November 17, 1894; and it is therefore considered and ordered by the court that said David B. Sayre be discharged from custody of the said Captain M. L. Johnson, commanding the United States receiveing ship "Franklin," as aforesaid, and that he go hence without day.

It is further ordered that the United States marshal serve a copy of this order upon the said Captain M. L. Johnson, commanding United States receiving ship "Franklin."

To which finding and judgment of the court the United States district attorney excepts, and prays that the exception may be noted.

RO. W. HUGHES, *Judge.*

172 The circuit court of the United States for the eastern district of Virginia, at Norfolk, November term, A. D. 1894.

Appeal.

No. . In re application of David B Sayre for a writ of habeas corpus.

To the Honorable Robt. W. Hughes, judge of the circuit court of the United States for the eastern district of Virginia, at Norfolk.

M. L. Johnson, captain, United States Navy, commanding the United States receiving ship "Franklin," stationed at the navy-yard at Norfolk, Va., by his attorneys, Francis R. Lassiter, United States attorney for the eastern district of Virginia, and Littleton W. T. Waller, feeling aggrieved by the order and judgment entered on the 14th day of November, 1894, in the above-entitled proceeding, hereby appeals from the said order to the Supreme Court of the United States, and prays that his appeal may be allowed, and that a transcript of the record of proceedings and papers upon which said order is made, duly authenticated, may be sent to the Supreme Court of the United States. And he herewith files his assignments of error, and prays that they may be read in connection with this appeal.

FRANCIS R. LASSITER,
U. S. Attorney, Eastern District of Virginia,
LITTLETON W. T. WALLER,
Attorneys.

173 The circuit court of the United States for the eastern district of Virginia, at Norfolk, November term, A. D. 1894.

Assignment of error.

In re application of David B. Sayre for writ of habeas corpus.

Afterwards, to wit, on the 14th day of December, 1894, in this same term, before the honorable judges of the circuit court for the eastern district of Virginia, in the city of Norfolk, Va., comes M. L. Johnson, captain, commanding the United States receiving ship "Franklin" stationed at the navy-yard at Norfolk, Va., by his attorneys, Francis R. Lassiter, United States attorney for the eastern district of Virginia, and Littleton W. T. Waller, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1. The court erred in taking jurisdiction of the petition in this cause.
2. The court erred in granting the application for the writ of habeas corpus.
3. The court erred in admitting as evidence in this cause the writing, purporting to be a copy of the proceedings had and evidence heard by the court-martial which tried the petitioner on the days from October 30 to November 2d, 1894.
4. The court erred in finding the punishment awarded by the said court-martial to be "cruel and unusual."
5. The court erred in finding the sentence of the said court-material to be an infringement of the fifth amendment of the Constitution of the United States.
6. The court erred in extending the limitation of the phrase "when in actual service in time of war or public danger," in the fifth amend-
174 ment to the Constitution of the United States, to "cases arising in the land or naval forces."
7. The court erred in finding that the petitioner, a paymaster's clerk in the United States Navy, appointed to serve and serving on board the United States receiving ship "Franklin," is a paymaster's clerk doing duty on land.
8. The court erred in holding that the sentence of the said court-martial was void, in so far at it awarded an infamous punishment.
9. The court erred in holding that the sentence of the court-martial which tried the petitioner was coram non judice in respect to the imprisonment therein awarded.
10. The court erred in discharging the petitioner.

For other errors appearing upon the record.

Whereas by the law of the land the said writ of habeas corpus should have been discharged and the prisoner remanded to the prison at the navy-yard, Boston, Mass., to serve out his sentence.

And the said M. L. Johnson, captain, commanding the United States receiving ship "Franklin" aforesaid, prays that the order and judgment aforesaid may be reversed, annulled, and held for naught, and for such other relief as may be proper in the premises.

FRANCIS R. LASSITER,
U. S. Attorney Eastern District of Virginia,
LITTLETON W. T. WALLER,
Attorneys.

175 The circuit court of the United States for the eastern district of Virginia, at Norfolk. November term, 1894.

Entry allowing appeal.

In re application of David B. Sayre for writ of habeas corpus. And now, to wit, on the 14th day of December, 1894, it is ordered that the appeal be allowed as prayed for. It is further ordered that said petitioner, David B. Sayre, may, at any time pending said appeal, be enlarged upon executing a recognizance with sureties in the sum of $1,000.00 to the satisfaction of the clerk of this court, for his appearance to answer the judgment of the Supreme Court of the United States, and upon failure to give bail to remain in the custody of the commanding officer of the receiving ship "Franklin."

RO. W. HUGHES,
District Judge.

NORFOLK, 14*th Decb.*, 1894.

176 *Citation.*

The United States of America, ss. To David B. Sayre, greeting:

Whereas M. L. Johnson, captain, commanding the United States receiving ship "Franklin," has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the eastern district of Virginia, made in favor of you, the said David B. Sayre; you are therefore hereby cited to appear before the said Supreme Court at the city of Washington, on 21st day of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Norfolk, in the 4th circuit, this 14th day of December, 1894.

RO. W. HUGHES,
District Judge, sitting in the Circuit Court of the United States for the Eastern District of Virginia.

We hereby, this 14th day of December, 1894, accept due personal service of this citation on behalf of David B. Sayre, the appellee.

EDWARDS & HAPPER,
ALEX. E. WARNER,
Solicitors for Appellee.

177 Thereupon the petitioner, David B. Sayre, gave the required bail in the sum of one thousand dollars, with good and sufficient sureties, to answer the decree of the court.

Order to transmit record.

Thereupon it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, with all things thereunto relating,

be transmitted to the Supreme Court of the United States, to be held at Washington on the 21st day of December, 1894.

And the same is transmitted accordingly.

Teste:

M. F. PLEASANTS, *Clerk.*

Certification.

UNITED STATES OF AMERICA,
Eastern District of Virginia, to wit:

I, M. F. Pleasants, clerk of the circuit court of the United States for the fourth circuit, in and for the eastern district of Virginia, do certify that the foregoing is a full and true record of the proceedings and judgment of the said court in the therein-entitled cause.

In testimony whereof, I hereto set my hand and affix the seal of the said court on this 14th day of December, 1894.

[SEAL.]

M. F. PLEASANTS, *Clerk.*
By H. S. ACKISS, *Deputy Clerk.*

(Indorsement on cover:) Case No. 15755. Term No., 871. M. L. Johnson, captain, U. S. Navy, appellant, vs. David B. Sayre. E. Virginia C. C. U. S. Filed December 19, 1894.

Office Supreme Court U. S.
FILED.
MAR 29 1895
JAMES H. McKENNEY,
CLERK.

158-109

158-109

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

M. L. JOHNSON, CAPTAIN, UNITED States Navy, appellant,
v.
DAVID B. SAYRE.
} No. 871.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

M. L. JOHNSON, CAPTAIN, UNITED States Navy, appellant,
v.
DAVID B. SAYRE.
No. 871.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The defendant, Sayre, was clerk to a paymaster in the United States Navy, on duty on the receiving ship *Franklin*, lying at the Norfolk Navy-Yard, from whose custody he was accused of embezzling funds of the Navy to the amount of about $2,000. After examination by a naval court of inquiry the case was sent to a court-martial specially called by the Secretary of the Navy. The court-

martial found against the accused, and sentenced him "to be confined in such place as the honorable Secretary of the Navy may designate for the period of two years; to lose all pay that may become due him during such confinement, excepting the sum of ten dollars per month and the further sum of one hundred and fifty dollars to be paid him at the expiration of confinement, the total loss of pay amounting to two thousand two hundred and ten dollars, then to be dishonorably dismissed from the naval service of the United States."

The sentence was approved by the Secretary of the Navy, and the prison at the navy-yard, Boston, Mass., was designated as the place for carrying into execution that part which related to confinement. Sayre, being in the custody of the appellant at the Norfolk Navy-Yard awaiting execution of the sentence, filed his petition in habeas corpus on November 21, 1894, in the circuit court of the United States for the eastern district of Virginia. The writ issued, and on December 3 the court entered an order discharging the petitioner from "the infamous punishment and releasing him from custody as to that part of the sentence, but without prejudice to the sentence of the court-martial in any other respect," upon the ground that, although Sayre was in the naval service, he could not, in time of peace, be punished for the offense which he committed, by court-martial or otherwise than on indictment by a grand jury, under the fifth amendment to the Constitution; and also on the ground that the sentence of the court-martial was "cruel and unusual" and prohibited by the eighth amendment.

ASSIGNMENT OF ERRORS.

1. The court erred in taking jurisdiction of the petition in this cause.

2. The court erred in granting the application for the writ of habeas corpus.

3. The court erred in admitting as evidence in this cause the writing, purporting to be a copy of the proceedings had and evidence heard by the court-martial which tried the petitioner on the days from October 30 to November 2, 1894.

4. The court erred in finding the punishment awarded by the said court-martial to be "cruel and unusual."

5. The court erred in finding the sentence of the said court-martial to be an infringement of the fifth amendment of the Constitution of the United States.

6. The court erred in extending the limitation of the phrase "when in actual service in time of war or public danger," in the fifth amendment to the Constitution of the United States, to "cases arising in the land or naval forces."

7. The court erred in finding that the petitioner, a paymaster's clerk in the United States Navy, appointed to serve and serving on board the U. S. receiving ship *Franklin*, is a paymaster's clerk doing duty on land.

8. The court erred in holding that the sentence of the said court-martial was void, in so far as it awarded an infamous punishment.

9. The court erred in holding that the sentence of the court-martial which tried the petitioner was *coram non judice* in respect to the imprisonment therein awarded.

10. The court erred in discharging the petitioner.

The first question to be considered is that of jurisdiction—the question of jurisdiction, and not the exercise of jurisdiction.

"The power to hear and determine a cause is jurisdiction. It is *coram judice* whenever a case is presented which brings the power into play." (*Grignon* v. *Astor*, 2 How., 338.)

The jurisdiction of the court can not depend upon its decision upon the merits of the cause brought before it, but upon the right to hear and decide it at all. (*Ex parte Watkins*, 7 Pet., 572; *United States* v. *Arredondo*, 6 Pet., 709; *State of Rhode Island* v. *State of Massachusetts*, 12 Pet., 718; *Ex parte Watkins*, 3 Pet., 205; *Kendall* v. *United States*, 12 Pet., 623.)

If the interpretation of the circuit court for the Eastern district of Virginia as to the limitations of the fifth amendment to the Constitution is correct, the court-martial had not the power, the jurisdiction, over this case, and the proceedings were absolutely void *ab initio*, and no part of the sentence was legal. "Where there is no jurisdiction there is no judge."

As said by the court in *Bain's Case* (121 U. S., 1):

> The declaration of article 5 of the amendments to the Constitution that "no person shall be held to answer, etc., is *jurisdictional.*

In such case the person can not be tried without the indictment. "*There is nothing before the court on which it can hear evidence or pronounce sentence.*"

See also Hawes on Jurisdiction, sec. 38; 1 Black on Judgment, sec. 256 et seq.

If this be true, it follows, necessarily, that the ruling of the circuit court was inconsistent, in that it denies the jurisdiction of the court-martial, yet approves a portion of the sentence of the court.

This is a republican Government, the form of which was dictated by suspicion and guarded by jealousy. To such a Government, it is obvious, no more power would be granted than what was believed to be necessary to attain the objects which its authors, the people, had in view; and that the powers necessary to this end would be checked and balanced by distributing them between the different departments, each independent of the other, and placed as a sentinel over its acts; that concurrence of opinion between the different departments would be requisite in all matters involving great interests; and that the high destinies of the people would never be committed to the discretion of a single man or single department. These principles are dictated by the spirit of all our institutions and exhibited in every part of the Constitution itself.

To secure the liberties of the people, the Constitution created three coordinate departments of government, the legislative, executive, and judiciary, each independent of the other, and it distributed all the powers it meant to convey. Beginning with the legislative department, it provides, in the first section of the first article that all the legislative powers therein granted should be vested in a Congress, to consist of two bodies, the House of Representatives and the Senate.

Pursuing this division it proceeds to prescribe the manner in which the House of Representatives shall be chosen.

The authority for the organization of courts-martial is found in the Constitution, which gives power to Congress—

"To provide and maintain a navy;"

"To make rules for the government of the land and naval forces;"

"To provide for the organizing, arming, and disciplining the militia, and for the governing such part of them as may be employed in the service of the United States."

"The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States when called into actual service of the United States."

And, the fifth amendment to the Constitution, which expressly excepts in its provisions—"Cases arising in the land and naval forces."

According to all received opinions upon the subject of interpretation which have ever come under my observation, the meaning of language is to be sought for, first, in the obvious signification of the words used. If this be certain, the intention of him who used them is fixed and determined; but if doubt still remains, this doubt must be removed by a reference to their context; and if certainty is not there found, then resort must be had to other words, used cotemporaneously, by the same author, in reference to the same or similar subjects.

According to the first of these well approved standards the true nature and precise meaning of the exceptions in the provisions of the fifth amendment stand clear and confessed. This meaning is, that so long as the militia

were *ordinary citizens* they should be governed by the same laws applying to other ordinary citizens—but when they should put off their civil characters and assume the characters of a military body in the actual service of the General Government, in time of war or public danger, then they should be subject to the rules and regulations and laws governing the land and naval forces.

Where the language of the Constitution is doubtful, the constant practice under it, regularly and invariably pursued, whenever a case has arisen within the scope of the doubtful grant, and in which practice all have acquiesced, and for a long time, is entitled to very high respect; perhaps I might go further and say, ought to be considered as conclusive, to show that such practice was right.

This is because in a doubtful case such constant and regular practice, so uniformly and invariably acquiesced in, amount to the highest evidence, to prove the correctness of the original construction of the grant, from which grant the power is directly deduced.

But where the language of the Constitution is not doubtful, or where cases are found of mere occasional departure from the principles on which the Constitution itself is founded, the precedent they may furnish ought not to weigh "even as the dust in the balance."

If this be so, it follows, necessarily, that before any case furnished can be considered as entitled to the slightest respect as a precedent, it must be shown to be in accordance with the principles of our institutions, not contrary to the *expressed* precepts of the Constitution, and to have

been adopted as a rule regularly and invariably observed in all cases of the same kind which preceded or followed it.

In *Kurtz* v. *Moffitt* (115 U. S., 500), the court held:

> The fifth article of the amendments to the Constitution, which declares "that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," expressly excepts "cases arising in the land and naval forces," and leaves such cases subject to the rules for the government and regulation of those forces which, by the first article of the Constitution (section 8), Congress is empowered to make.

As regards offenses committed by persons in the *militia*, the exception was limited to those—

> In actual service in time of war or public danger. * * * Therefore, if a person who is a member of the militia is charged with a crime against the United States, he can not be proceeded against without indictment or presentment of a grand jury, unless he be "in the actual service of the United States" and "in time of war or public danger." (*Miller on Constn., Lecture* 10, p. 507.)

The principle laid down in *Kurtz* v. *Moffitt supra*, has been followed without variation as cases have arisen. (*Ex parte Milligan*, 4 Wall., 137, 138; *Dynes* v. *Hoover*, 20 How., 65; *Ex parte Reed*, 100 U. S., 13; *Ex parte Mason*, 105 U. S., 696; *Wales* v. *Whitney*, 114 U. S., 564; *Smith* v. *Whitney*, 116 U. S., 177; *Ex parte Watkins*, 3 Pet., 193; XII Opin., 510.)

The provisions of the fifth, sixth, and eighth amendments to the Constitution, relating to criminal proceedings, apply only to the courts, etc., of the United States.

(Winthrop's Digest Op. J. A. G., 248; *Barron* v. *Mayor of Baltimore*, 7 Pet., 243; *Ex parte Watkins, Id.*, 578; *Twitchell* v. *Commonwealth*, 7 Wall., 326; *Edwards* v. *Elliott*, 21 *Id.*, 557; *Walker* v. *Sauvinet*, 92 U. S., 90; *Pearson* v. *Yewdall*, 95 U. S., 294; 1 Bishops, Cr. L., sec. 725; *In re Esmond*, 5 Mackey, 164; *Runkle* v. *United States*, 19 C. Cls. R. 396.)

Pursuant to the powers before recited, Congress passed the act of March 2, 1863 (Art. 14, sec. 1624, Rev. Stat.):

> Fine and imprisonment, or such other punishment as a court-martial may adjudge, shall be inflicted upon any person in the naval service of the United States * * * who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully and knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, *money*, or other property of the United States furnished or intended for the military service thereof.

And again, Article 23:

> All offenses committed by persons belonging to the Navy while on shore shall be punished in the same manner as if they had been committed at sea.

As said in *Ex parte Milligan*, 4 Wall., 123:

> Every one connected with these branches [Army and Navy] of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts.

Mr. Garfield in *Ex parte Milligan*, 4 Wall., 43 said:

> Rules and articles of war are as really a part of the laws of the land as the judiciary act or the act establishing the Treasury Department.

It is clear that the court-martial had jurisdiction over the subject-matter.

We will now inquire into its jurisdiction over the person.

The record shows that the defendant was a regularly appointed clerk to a paymaster in the United States Navy. He was appointed in accordance with the existing Navy Regulations (articles 29 and 1697). The latter article, in section 2, says:

> In accepting appointments they shall be required to bind themselves to be subject to such laws and regulations for the government and discipline of the Navy as have been or may be enacted by Congress, or established by other competent authority. The acceptance must be accompanied by the oath of office prescribed by law. (Rev. Stat., secs. 1386, 1387, 1388; Navy Reg., 1893.)

It has been claimed by opposing counsel that consent does not give jurisdiction.

The main boundary between the civil and military jurisdiction is the entry into service. (*Ex parte Milligan*, 4 Wall., 43.)

Navy Regulations, when supplemental to and consistent with the Revised Statutes, have the force and effect of law. (*Ex parte Milligan*, 4 Wall., 43; *Smith* v. *Whitney*, 116 U. S., 181; *United States* v. *Maurice*, 2 Brock, 96, 105; *Martin* v. *Mott*, 12 Wheat., 19; 1 Kent's Com., 370 and note; Rev. Stat., sec. 1547.)

The defendant, by his letter of acceptance and oath of office (Exhibit F, 142 and 143), placed himself under the laws and regulations for the government of the Navy, and

while thus serving surrendered his right to be tried by the civil courts. (See *Ex parte* Milligan, 4 Wall., 43.)

> The regularly appointed clerk to a paymaster in the Navy is a person in the naval service of the United States within the meaning of Article 14, section 1624, Revised Statutes, and for a violation of its provisions is subject to be tried, convicted, and sentenced by a naval general court-martial. (*Ex parte* Reed, 100 U. S., p. 13; *in re* Bogart, 3 Cir. and Dist. Cases.)
>
> A paymaster's clerk in the Navy is an officer of the Navy within the meaning of the provision in the act of *March* 3, 1883, 22 *Stat.*, 473, *c.* 97. (*United States* v. *Hendee*, 124 U. S., 309, 314.)

Opposing counsel claim that there is a distinction to be made between the position of a pay clerk in the Navy serving on board ship and one appointed in the same manner, with the same obligations, but serving on shore.

The court, in its decision in the case of Reed (100 U. S., 13), does not make any distinction between the two duties. It says: "The *regularly* appointed clerk to a paymaster," etc.

This point is entirely covered by Article 23, section 1624, Revised Statutes:

> All offenses committed by persons belonging to the Navy while on shore shall be punished in the same manner as if they had been committed at sea.

Opposing counsel contend that the duty performed by the defendant on board the U. S. receiving ship *Franklin* was shore duty. This opinion is also held by the circuit court before which the cause was heard. While this question has no real bearing on the case I will refer to it briefly.

A receiving ship, although moored to a dock or, as in this case, anchored in a harbor, is still employed with the authority of law, is under the same restrictions, regulations, and requirements that are incident or peculiar to the service on the high sea, and for the purposes of this case as well as of pay and emolument is, within the meaning of the law, "*at sea.*" All officers on receiving ships receive *sea pay.*

It is also claimed by opposing counsel that the receiving ship at a navy-yard is under the immediate command of the admiral or commodore commanding the station. This is not correct. Each receiving ship has its own commanding officer, and the autonomy is the same as though she was in midocean. She is immediately under his, the admiral's, command, bears the same relation to the admiral that the individual ships or flagship of a squadron bear to the admiral of a fleet or squadron.

For the decisions on the subject of receiving ships see *United States* v. *Symonds*, 120 U. S., 46, and *United States* v. *Bishop*, 120 U. S., 51, and *United States* v. *Strong*, 125 U. S., 656.

It is clear that the court-martial had jurisdiction over the person and the case.

The court-martial having jurisdiction over the person and the case, the circuit court erred:

1. In taking jurisdiction of the petition in this case;

2. In granting the application for the writ of *habeas corpus;*

3. In admitting as evidence in this cause the writing purporting to be a copy of the proceedings had and the

evidence heard by the court-martial which tried the petitioner on the days from October 30 to November 2, 1894.

4. In discharging the petitioner.

The court-martial was organized according to law; its proceedings were conducted according to the rules laid down for it. The proceedings, findings, and sentence were approved by the proper authority, and when confirmed it is altogether beyond the jurisdiction of any civil tribunal whatever, unless it shall be a cause in which the court had not jurisdiction over the subject matter, or one having jurisdiction over the subject matter, it has failed to observe the rules prescribed by statute for its exercise. (*Dynes* v. *Hoover*, 20 How., 65.)

The court had jurisdiction over the person and the case. It is the organism provided by law and clothed with the duty of administering justice in this class of cases. Having had such jurisdiction, its proceedings can not be collaterally impeached for any mere error or irregularity, if there were such, committed in the sphere of its authority. Its judgments when approved as required rest on the same basis and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under like circumstances.

The exercise of discretion, within authorized limits, can not be assigned for error and made the subject of review by an appellate court.

Here there was no defect of jurisdiction as to anything that was done. Beyond this we need not look into the record. Whatever was done, that the court could do under any circumstances, we must presume was properly

done. If error was done in the rightful exercise of authority, we can not correct it. A writ of habeas corpus can not be made to perform the functions of a writ of error. To warrant the discharge of the petitioner, the sentence under which he is held must be, not merely erroneous and voidable, but absolutely void. (*Ex parte Reed*, 100 U. S., p. 13; *Ex parte Kearney*, 7 Wheat., 38; *Ex parte Watkins*, 3 Pet., 193; *Ex parte Milligan*, 4 Wall., 43, IV Op., 170; *Id.*, 274; VI *Id.*, 507, 514; VII *Id.*, 104; X *Id.*, 65, 67; XIV *Id.*, 448.) I hold that the decision of the Secretary of the Navy in cases of this sort is that of the ultimate judge provided by the Constitution and the law. Like that of any other court in the last resort of law, it is final as to the subject-matter.

Courts-martial form no part of the judicial system of the United States, and their proceedings, within the limits of their jurisdiction, can not be controlled or revised by the civil courts. (*Dynes* v. *Hoover*, 20 How., 65; *Ex parte Mason*, 105 U. S., 696; *Wales* v. *Whitney*, 114 U. S., 564; *Smith* v. *Whitney*, 116 U. S., 177.)

> Neither this court nor the supreme court of the District of Columbia has appellate jurisdiction over a naval court-martial, nor over the offenses which it has the power to try. (*Wales* v. *Whitney*, 114 U. S., 564.)

5. The court also erred in finding the punishment awarded by the court-martial to be "cruel and unusual."

Unusual may be said to be one not recognized by law or usage. (1 Winthrop's M. L., 519.)

This sentence is sanctioned by usage, permitted and directed by law. (Art. 14, sec. 1624, Rev. Stat.; XII

Op., 510; X *Id.*, 158; IX *Id.*, 80; *In re Bogart*, 3, Cir. and Dist. Cases; *Ex parte Reed*, 100 U. S., 13; *Ex parte Mason*, 105 U. S., 700; Arts. 7 and 8, sec. 1624, Rev. Stat.)

It is held in army practice that a sentence of penitentiary confinement in a case of purely military offense is wholly unauthorized by law and should be disapproved. Larceny, embezzlement, violent crime, or other offenses made punishable with penitentiary confinement is a case of "by law of the state, etc.," may be legally visited its punishment. (1 Winthrop, 519; 1 Bishop C. L., 940.)

> A naval or marine court-martial, upon conviction for an offense not capital, under articles 7 and 8, may sentence to imprisonment at hard labor. (Evarts, XII Op. 510.)

The sentence is in accordance with the law of the land. The act done is a civil crime, and the trial is for that act. The proceedings were had in a court-martial because the offender was personally amenable to that jurisdiction, and what he did was not only criminal according to the laws of the land, but was "scandalous conduct tending to destruction of good morals," and it is nowhere provided that the punishment may not in other respects be greater than the civil courts could inflict. (*Ex parte Mason*, 105 U. S., 700.)

The learned judge of the circuit court for the eastern district of Virginia says in an amended decision in this case (see appendix), which has not been printed in the record:

> Cases have been cited to show that the Supreme Court of the United States has held that militia

courts-martial only are meant by the clause which I have quoted from the fifth amendment. * * * To construe these words into a forced or limited meaning is to destroy that instrument; and if a court of justice, be it even the Supreme Court of the United States, descends to employ the unworthy sophistries of construction, such a device does not absolve any officer of the Government from his obligation to support the Constitution according to its very words. I am bound to support that Constitution as it is, and not as the facile ingenuity of any member of any court, or any court, however high in authority, may construe it to be. It is therefore useless labor for counsel to cite me cases in which the words of the Constitution, "No person," etc., has been construed to mean only that militia courts-martial in time of peace may not condemn to an infamous punishment. The language is equally prohibitive against the court-martials of the standing Army and the Navy, and that language is more binding upon the consciences of all charged with the administration of our laws than acts of Congress, or general orders of the Army and Navy, or even rulings of superior or supreme courts.

When the Constitution of the United States was first adopted, indeed for a quarter of a century afterwards, the right of each State to construe the Constitution for itself, regardless of the construction adopted by the Supreme Court of the United States, was vigorously insisted upon. I can nowhere find an instance where an *inferior Federal court* has claimed for itself the right to place its own construction on the Constitution, regardless of the construction placed upon it by the Supreme Court of the United States.

It is also recited in the decision of the circuit court in this case that—

> The prison at Boston was shown in evidence to be one of narrow cells and limited appliances for comfort, and such as would seem to render confinement in it for a long term of punishment which the law regards as "cruel and unusual."

The decision also calls attention to an order by one of the Secretaries of the Navy, in General Orders, No. 163, which states that the prisons at the command of the Department were "not constituted nor intended for purposes of long imprisonment."

This order in 1871 referred to the condition of the naval prisons at that time. The prison at Boston was remodeled nearly twenty years later, and is commodious and comfortable. The fare is excellent, in fact better than any of the barracks, for the reason that the rations are larger, and nearly all of them are commuted in such manner as to give great variety to the bill of fare.

There is no evidence in the record of the case before the circuit court touching this prison.

LITTLETON W. T. WALLER,
Of Counsel.

HOLMES CONRAD,
Solicitor-General.

APPENDIX.

In the circuit court of the United States for the eastern district of Virginia, at Norfolk.

In re David B. Sayre, on a petition for a writ of habeas corpus.

Cases have been cited to show that the Supreme Court of the United States has held that militia courts-martial only are meant by the clause which I have quoted from the fifth amendment.

A Vice-President of the United States (Mr. Dallas) has said in one of his rulings as President of the Senate: "The Constitution in its words is plain and intelligible, and it is meant for the home-bred, unsophisticated understandings of our fellow-citizens."

He spoke truly. Its language is so plain as to need no gloss or construction. And when an officer of the United States, who has sworn to support it, wishes to know his duty he has but to look at its plain and simple words.

To construe those words into forced or limited meanings is to destroy that instrument; and if a court of justice, be it even the Supreme Court of the United States, descends to employ the unworthy sophistries of construction, such a device does not absolve any officer of the Government from his obligation to support the Constitution according to its very words. I am bound to support the Constitution as it is, and not as the facile ingenuity of any member of any court, or any court, however high in authority, may construe it to be.

It is, therefore, a useless labor for counsel to cite to me cases in which the words of the Constitution, "No person shall be held to answer for an infamous crime unless on an indictment of a grand jury, except in cases arising in the land and naval forces, or in the militia, when in actual service in time of war or public danger," has been construed to mean only that militia courts-martial in time of peace may not condemn to infamous punishment. The language is equally prohibitive against courts-martial of the standing Army and the Navy, and that language is more binding upon the conscience of all charged with the administration of our laws than acts of Congress or general orders of the Army and Navy, or even the rulings of superior or supreme courts.

I, H. S. Ackiss, deputy clerk of the court aforesaid, do hereby certify that the foregoing is a true and full copy of an addenda to the opinion of the court in the case of David B. Sayre, before mentioned, and that the same does not appear in the original record in the case as it now stands on the docket of the Supreme Court of the United States for the reason that it was added to the original opinion in the case after it had been certified to the Supreme Court, and that the foregoing addenda should be inserted as page $6\frac{1}{2}$ in the opinion in the above-entitled cause.

Witness my hand and the official seal of the circuit court of the United States for the eastern district of Virginia, at Norfolk, this 23d day of March, A. D. 1895.

[SEAL.] H. S. ACKISS,
Deputy Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

M. L. JOHNSON, CAPT. U. S. NAVY, *Appellant*,
vs.
DAVID B. SAYRE. } No. 871.

Appeal from the Circuit Court of the U. S., for the Eastern District of Virginia.

BRIEF FOR THE DEFENDANT.

The record in this case presents the following facts:

1st. That the defendant was appointed clerk to Paymaster J. E. Cann, and assigned to duty on the United States receiving ship Franklin, at navy yard, Norfolk, Va.

2d. That the ship Franklin was incapable of leaving her mooring, or of performing sea duty.

3d. That the duties of Paymaster Cann were shore duties.

4th. That the defendant was, on October 10, 1894, arrested and placed in close confinement, without being informed of the nature or cause of his arrest.

5th. That it was not until October 26, 1894, that he was furnished with a copy of the charge and specification setting forth his offence.

6th. That the charge was embezzlement, in violation of Article 14 of the Articles for the Government of the Navy; the specification setting forth, that he did, knowingly and wilfully, misappropriate and apply to his own use money entrusted to him by Paymaster Cann.

7th. That the defendant was, on said charge and specification, tried and convicted by a naval general court-martial, convened at the navy yard, Norfolk, Va., October 30, 1894, and sentenced:

"To be confined, in such place as the honorable Secretary of the Navy may designate, for the period of two (2) years, to lose, etc."

From these facts it is contended by the defendant that there was no error in the Circuit Court for the Eastern District of Virginia in awarding to him the writ of *habeas corpus*, and that it was not error in the said court to discharge him from custody.

For this contention the following reasons are presented:

1. That the court-martial had no jurisdiction over the person of the defendant.

2. That it had no jurisdiction of the case or subject matter.

3. That if it had jurisdiction over the person and the case, then its proceedings and sentence were in violation of the law, and so became *coram non judice* and void.

Considering these propositions, in the order presented, we are brought first to enquire:

1. Had the court-martial jurisdiction over the person of the accused?

Is a clerk to the paymaster a part of the naval force, within the meaning of the fifth amendment to the constitution? If he is, it must be for some other reason than his letter of acceptance of the position.

That letter does nothing more than to oblige him "to comply with and be obedient to such laws, regulations and discip-

line of the Navy as are now in force, or that may be enacted by Congress, or established by other competent authority." This much would have been implied had there been no such letter of acceptance. It cannot be construed as a waiver of his constitutional right of trial by jury. He could not waive this right, nor can consent give jurisdiction.

If he is subject to such jurisdiction, it must be for the higher reason, namely: that he is made by law a part of the naval force. We know of no such law. The only acts of Congress which refer to the clerk of a paymaster, are those embraced in sections 1386, 1387 and 1388 of the Revised Statutes, and these sections merely provide that certain paymasters shall each be allowed a clerk.

The acts of Congress do not seem to contemplate him as a part of the organization of the Navy, but merely as the servant of the paymaster. They do not provide for his appointment, and have not vested that power in the Secretary of the Navy; hence, in accordance with Art. 11, Sec. 2, of the constitution, he has no such power. We contend that the paymaster alone can make the appointment. The regulations require his appointment upon the paymaster's nomination.

U. S. Navy Reg., Art. 1697, Sec. 1.

His acceptance binds him only to serve with the officer who nominated him until discharged.

U. S. Navy Reg., Art. 1697, Sec. 3.

His appointment is for a limited period.

Id., Art. 29.

He can merely assist the paymaster in keeping his accounts; he can sign no official paper.

Id., Art. 706.

He can receive and disburse none of the funds entrusted to the paymaster.

Id., Art. 1490.

He has no grade, rating or rank. He is not commissioned nor enlisted. He is not an officer.

Sec. 2, Art. 11, Constitution.

United States v. Morat, 124 U. S. 303.

United States v. Hendee, 124 U. S. 314, 315.

He is expressly excepted from the list of petty officers, and is entitled to no obedience.

Rev. Stat., Sec. 1410.

He may be appointed for sea duty, as clerk to paymasters of the fleet and paymasters on vessels; or he may be appointed for shore duty, as clerk to paymasters on receiving ships, paymasters at stations and paymasters at the Naval Academy.

Revised Statutes, Sec. 1386.

His acceptance is not compulsory. Accompanying his letter of acceptance is his appointment, showing the duties for which he is appointed—whether they are duties on shore or at sea. (Exhibit F, page 72, Record.)

An acceptance by him of shore duties is not an acceptance by him of sea duties. If he accepts the former, it is not within the power of the government to order him to sea. Such an acceptance deprives him of none of the legal rights enjoyed by other clerks in the naval establishment.

Reed's case, *100 U. S. 13*, is not in conflict with this position. Reed was a clerk appointed for sea duty; his offence was committed at sea, and his trial was there had.

2. Had the court-martial jurisdiction of the case or subject-matter?

The offence charged against the defendant was that of embezzlement of money from the United States.

We maintain that no such offence can be committed by a paymaster's clerk. If guilty at all, he was guilty of embezzlement from the paymaster, J. C. Cann.

There being no such offence as that charged against the defendant, the proceedings of the court-martial were void.

Dynes v. Hoover, 20 How. 65.

Embezzlement is the wrongful and fraudulent conversion of property, money or effects, which have come lawfully into the hands, possession or custody of the party charged with the offence.

U. S. v. Harper, 33 Federal R. 472.
2 Whart. Crim. L., Sections 1906, 1919, 1927.
Winthrop's Military L., Vol. 1, page 1011.
6 Amer. and En. Ency. of Law, 451 and seq.

In larceny, there must be *an unlawful* taking from the owner. "But in embezzlement there is no wrongful or unlawful acquisition of the custody or possession of the property embezzled. On the contrary, the party embezzling *must be lawfully in possession*, by virtue of some employment, trust or agency, *under and with the consent of the owner.*"

U. S. v. Harper, 33 Fed. R. 472.

"It is necessary, to constitute the offence, that the defendant should have received the money by virtue of his employment, *for the embezzlement of money by a servant not authorized to receive it is not within the statute*, although the party paying it to him supposes that he is so authorized."

2 Whart. on Crim. L., Sec. 1919.

Under this well-settled principle of law, it was imperative upon the government to show that the defendant was in the *lawful custody and possession* of the money alleged to be embezzled.

Could a clerk to the paymaster be in such lawful possession and custody?

In *re Spalding, General Orders No. 74, General Orders and Circulars, pages 50, 51*, Gideon Welles, Secretary of the Navy, says: "The evidence and argument of the accused before the

court rests upon the erroneous supposition that, inasmuch as an assistant paymayster—himself a bonded officer—had been ordered to assist him in the performance of his duties, Paymaster Spalding might transfer to him some share of his responsibilities. *Paymasters may not delegate any part of their responsibility to their subordinates.* Government property, drawn upon the requisition of a paymaster, stands charged to to him, and he is held to answer for any loss occurring through his negligence or that of his subordinates."

If this be the law, with reference to assistant paymasters, with what greater force is it true in reference to the clerk who is not an officer and not bonded?

Article 1490, of the Regulations for the Government of the Navy, provides: "The pay officer shall, except when prevented by an exigency of the service, to be determined by the commanding officer, be present and personally superintend all issues of money and the receipting therefor."

No such exigency arose, and the commanding officer never gave to Paymaster Cann permission to deliver to his clerk, the defendant, money to meet the expenses of the ship, and was never requested so to do.

(See testimony of Capt. Johnson, page 42 of record, questions 343, 344.)

We, therefore, claim that, under the laws governing the Navy, the defendant was not, and could not be, in the lawful possession of the money alleged to have been embezzled, and was not, and could not be, guilty of the offence charged.

3. But, if the court-martial had jurisdiction of the person and the case, its proceedings and sentence were in violation of law, and were *coram non judice* and void.

It fully appears, from the Record, that the defendant was arrested on the 10th day of October, 1894, on the verbal order of Captain Johnson.

(See Record, page 42, questions 335, 336.)

It further appears that a copy of the charge and specifica-

tion was not furnished to the defendant until the 26th day of October, 1894, sixteen days after his arrest.

That his trial was had on the 30th day of October, four days after service of the copy of the charge and specification, one of which days being a Sunday.

As soon as these facts appeared upon the trial, the defendant, by reason of the statute, Article 43 of the Articles for the Government of the Navy, moved the court to exclude all of the evidence, which motion the court overruled, and thereby rendered its proceedings void.

Article 43 provides: "The person accused shall be furnished with a true copy of the charges, with the specifications, *at the time he is put under arrest;* and no other charges than those *so furnished* shall be urged against him at the trial, unless it shall appear to the court that intelligence of such other charge had not reached the office ordering the court when the accused was put under arrest, or that some witness material to the support of such charge was at that time absent, and can be produced at the trial; in which case, reasonable time shall be given to the accused to make his defense against such *new charge.*"

Rev. Stat., Art. 43, page 283.

The Naval Regulations fully provide for the carrying into effect this act of Congress.

Article 1785, Section 2, page 462, United States Navy Regulations, provides: "2. When, therefore, such competent officer shall decide to have a party tried by court-martial, he shall cause such charges and specifications against him to be prepared as he may consider proper, and will transmit a true copy of them, *with an order for the arrest or confinement of the accused*, to the proper officer, who shall deliver *such order* to the accused, and will *carry it into effect* by delivering to him the copy of the charges and specifications, and, if an officer, by receiving his sword."

It is, therefore, clear that the court-martial, in receiving

evidence to sustain the charge and specification in this case, exceeded its authority, and violated the express provisions of the statute above mentioned, as well as the United States Navy Regulations.

This is not, as was claimed for it by the appellant, a mere technical defence. It involves one of the most sacred rights of the citizen—the right to be informed of the nature and cause of the accusation, and not to be deprived of liberty without due process of law.

Art. V., Amend. to Const.

Article 43 has for its object the perpetuation of this right to the humblest sailor on shipboard.

Nor can it be said that Congress did not intend what the language of that article—Article 43—clearly implies. They knew the common law as it existed in the States. This knowledge and intention may be amplified by reference to the Articles of War.

Art. 67 and Art. 71, Rev. Stat., page 237.

Article 67 provides: "No provost-marshal, or officer commanding a guard, shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States: provided the officer committing shall, at the same time, deliver an account, in writing, signed by himself, of the crime charged against the prisoner."

Article 71 provides: "When an officer is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges, on which he is to be tried, is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. *If a copy of the charges be not served, or the arrested officer be not brought to trial as herein required, the arrest shall cease.*" * * * *

It is therefore evident, by this distinction made between the navy and the army, that Congress fully appreciated the object in view, the preservation of the liberty of the accused.

The reason of this distinction we are left to surmise. It may have been, that, while in the army escape was easy, in the navy it was not so. But, whatever may have been the reason for the distinction, can it be contended, that, under the Articles of War—Article 71—the accused is not entitled to his liberty where the charge and specification has not been served upon him within eight days? And, for the same reason, it is here contended, that, under the Articles for the Goverment of the Navy—Article 43—the defendant was entitled to his discharge and liberty where the charge and specification was not served upon him at the time of his arrest.

But it is claimed by the appellant that this is a question, not of jurisdiction, but of the exercise of jurisdiction, and, therefore, not within the scope of this enquiry. And, in his brief, page 4, he says: "The jurisdiction of the court cannot depend upon its decision upon the merits of the cause brought before it, but upon the right to hear and decide it at all."

That it is the exercise of jurisdiction we may concede, but the exercise of that jurisdiction, in the case before the court, was extra-judicial and without authority of law, and its judgment was rendered *coram non judice* and void.

Grignon v. Astor, 2 *How.* 338.

We are not contending for the right to enquire into the action of the court-martial upon the merits, where it had the right to decide upon the merits, but we do maintain that, by the power which created the court—the Act of Congress—it had no right to hear and decide the case at all.

Conceding, for argument sake, that the court-martial had jurisdiction over the subject matter, it was still bound to adopt the rule prescribed by Congress in order to render its proceedings valid. Congress having prescribed that no charge

should be urged against the accused where a copy of the same had not been furnished him at the time of his arrest, as soon as the violation of this requirement became apparent to the court, its duty was to discharge the accused, and any judgment and sentence upon said charge was necessarily void.

This position is sustained by an unbroken line of authorities, beginning with the foundation of our government and extending to the present time.

Ex parte Siebold, 100 U. S. 371.
Ex parte Bain, 121 U. S. 1.
Kurtz v. Moffitt, 115 U. S. 487.
Ex parte Lange, 85 U. S. 163, 166.
Ex parte Parks, 93 U. S. 22.
Dynes v. Hoover, 23 How. 65, 80, 81.
And the numerous authorities in the above cases cited.

In *Dynes v. Hoover, page 30*, Mr. Justice Wayne says:

"Where a court has no jurisdiction over the subject matter, it tries and assumes it; or, where an inferior court has jurisdiction over the subject matter, *but is bound to adopt certain rules in its proceedings, from which it deviates, whereby the proceedings are rendered coram non judice*, that trespass for false imprisonment is the proper remedy, where the liberty of the citizen has been restrained by process of the court, or by the execution of its judgment, such is the law in either case, in respect to the court which acts without having jurisdiction over the subject matter; or which, having jurisdiction, disregards the rules of proceeding, enjoined by the law for its exercise, so as to render the case *coram non judice*."

In *Ex-parte Lange, page 166*, Mr. Justice Miller says:

"The authority of this court in such case, under the Constitution of the United States, and the 14th section of the Judiciary Act of 1789, to issue this writ, and to examine the proceedings in the inferior court, so far as may be necessary to ascertain whether that court has *exceeded its authority, is*

no longer open to question. The cases cited in the note below will, when examined, establish this proposition, so far as judicial decision can establish it."

It is, therefore, apparent that the Circuit Court did not err in admitting as evidence a copy of the proceedings had before the court-martial.

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